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Vol. II
TRANSCRIPT OF RECORD

(Pages 422 to 522)

Supreme Court of the United States

OCTOBER TERM, 1963

No. 304

HEMER P. REMMER, PETITIONER,

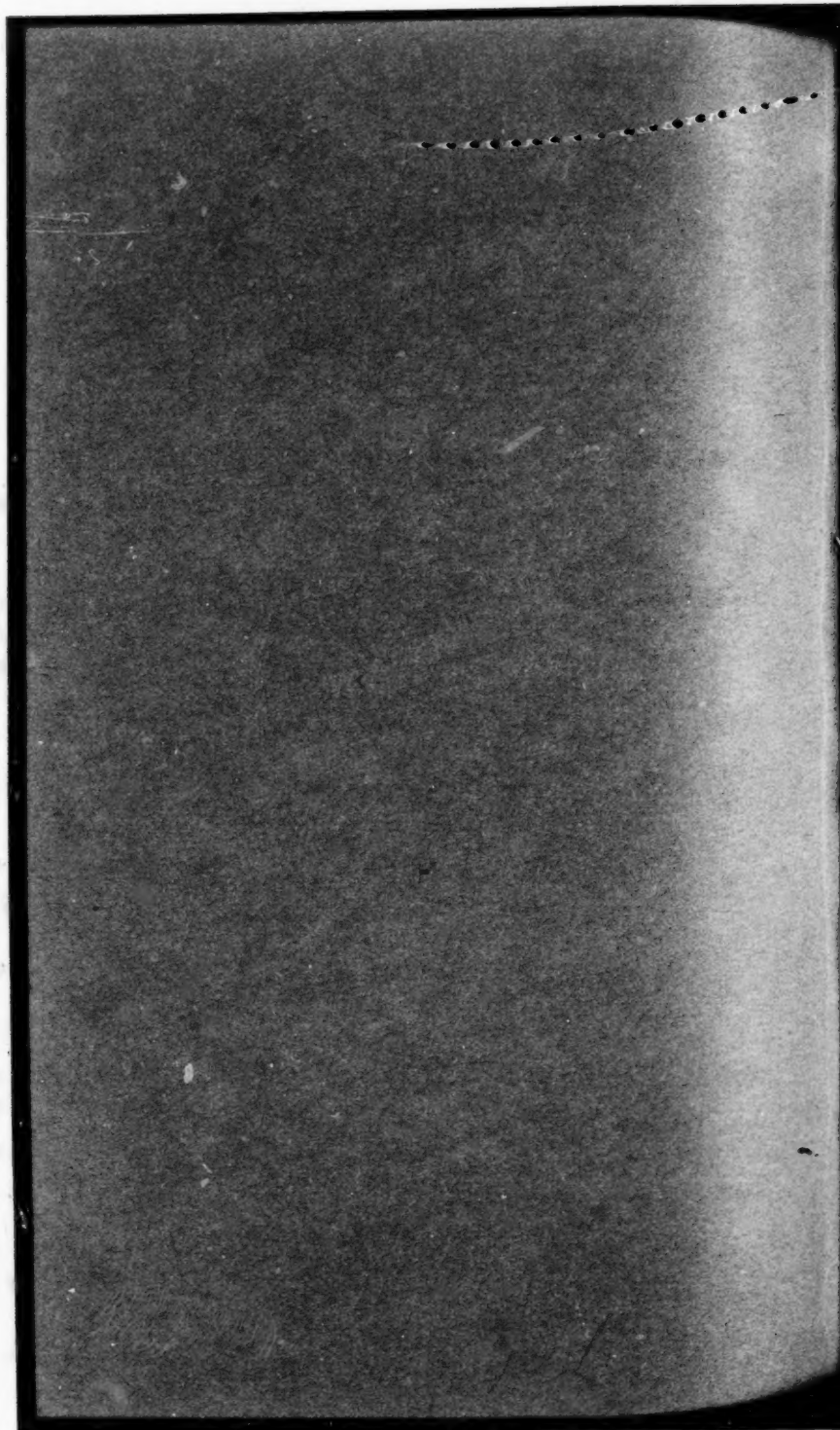
vs.

UNITED STATES OF AMERICA

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RECEIVED FOR TRANSMISSION FILED AUGUST 22, 1963

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No. 13281

**United States
Court of Appeals**
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Nine Volumes

Volume II
(Pages 449 to 900)

**Appeal from the United States District Court
for the District of Nevada.**

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[Title of District Court and Cause.]

ARGUMENT RE: EXHIBIT 176

Monday, January 28, 1952, 3:15 P.M.

(In the Absence of the Jury.)

Defendant present with counsel.

The Court: I understand you desire to take something up.

Mr. Golden: We requested that your Honor take the bench in the absence of the jury. Inasmuch as the jury was already outside for the usual recess, I thought this might be an opportune time to discuss this matter.

Now we are handicapped, in a sense, your Honor, because, of course, we do not know what the witness on the stand, Mr. Weaver, would say in connection with these checks which are marked for identification No. 176, and in that sense we may be premature, but so long as the jury is out, I would like to call this to the Court's attention.

At Mr. Campbell's request, we were handed just now by the clerk certain—at least, one letter from a medical man, which apparently was filed here with the clerk on the 21st of January, and also a second letter from that same doctor, this Earl I. Laskey, a doctor in Beverly Hills, California, and also an original and carbon undated letter, apparently written by F. C. Stewart, Medical Director, who signs himself as Medical Officer in Charge of Public Security Agency, Public Health Service, in Los Angeles, California. Now we assume, your

Honor, that the purpose of showing us these certificates from these doctors is to attempt to lay some sort of foundation for admission of hearsay testimony, consisting apparently of a conversation between the man Villaudy, who is named in the certificates, and the witness Mr. Weaver.

Now all that we actually know about the matter is that during the two weeks' recess we read in the newspapers that Mr. Campbell had stated that he had had this Mr. Villaudy examined by a government doctor and that the representations of Mr. Villaudy and his doctor that he was in ill health and unable to attend the trial in Carson City were groundless and just an excuse and that he was going to be subpoenaed as a witness. I say we read that in the newspaper. Now we find that the medical director of the Public Health Service apparently agrees with Mr. Villaudy's own doctor, to the effect it would be detrimental to Mr. Villaudy to come to Carson City at this time.

Now the rules provide a recognized procedure by way of depositions for taking of the testimony of a witness who is unable to attend or prevented from attending a trial at the hearing, Rule 15, your Honor. My suggestion is that we might here, in the absence of the jury—if this meets with your Honor's approval—what this hearsay testimony which is proposed consists of and it may well be that we would stipulate to the facts in that regard.

Now I call your Honor's attention that the three checks which have been marked Exhibit 176 for identification, the first check, chronologically, is

dated May 13, 1943, in the sum of two thousand dollars, apparently written on the account of Albert Villaudy, payable to the order of the First National Bank of Nevada. There is nothing on it whatsoever to connect it with this defendant or this case and the only way it could be connected, in the absence of Villaudy, would be by hearsay testimony. The other two checks, one September 6, 1944, in the sum of \$2,600, and one January 8, 1945, for the sum of two thousand dollars, are made payable to the defendant Elmer Remmer and one of them is endorsed with that name and with Mr. Maundrell's name and the other is endorsed with the defendant Remmer's and another name, I can't read—looks like F. W. Guiss. In any case, particularly in regard to the first check, it could only be connected up by hearsay and we do not think there is sufficient showing to produce some letters, the first of which is dated the 17th of January and the second the 21st of January and the third the 25th of January, to the effect that this witness can't come here without giving us an opportunity to determine that ourselves and the effect would be, of course, to deprive us of the right of cross-examination as to these checks.

Now as I say, in a sense it is premature. There is nothing offered yet, but it is reasonable to suppose that the purpose of showing the letters from the doctors and introducing these checks for identification is to ask Mr. Weaver some questions about them, and it would be hearsay. Now we might stipulate to these checks if we find out what the

contention of the government is and that is why we suggested we might take it up in the absence of the jury.

Mr. Campbell: I don't know what appeared in the papers. I might state we haven't had the newspapers down here for the time counsel referred to. The fact is the subpoena was issued for the presence of Mr. Villaudy and in response to that subpoena his attorney in Beverly Hills telephoned me and advised me that he was that day forwarding a certificate to the clerk of the court, which in due course was received by Mr. Pratt. After that had been received, I made the request, through his attorney, that he be examined by the doctor of the Public Health Service and he was so examined. The conclusion of both doctors is that Mr. Villaudy is too ill to appear, suffering from a large variety of ailments, including heart trouble and acute gout and arthritis, high blood pressure, shortness of breath, and other disabling ailments. I do not intend to take the time of the Court in requesting that the proceedings be had under the rule to suspend the trial while deposition is taken from this man. The evidence has heretofore shown that Mr. Remmer was charged on the books of Cal-Neva with certain monies which he advanced to Mr. Villaudy. We have here certain checks—of course, it is hearsay—which Mr. Weaver identified as having been paid on account of that loan. Now they have not been offered in evidence. If the objection is made that they are hearsay, of course, the objection is good. However, for what they are worth, we

have produced these and are advising the Court that we have advised counsel of these letters, which I ask to leave with the clerk as to Mr. Villaudy's condition. That is the government's position.

Mr. Golden: Well, our position is this, if your Honor please—an article appeared in the press from some source, not from us, that this Mr. Villaudy was faking and pretending he was unable to come here. Now that didn't come from us. Now we don't say who it came from, but those things do not help the defendant any in a case like this. Now afterward it would appear from the fact from what Mr. Campbell states and from the dates of these letters, that no effort was made to subpoena the proposed witness until some time this month, and this case started in November.

We are prepared to do this, your Honor. We are prepared to stipulate that the two checks which are payable to the order of Elmer Remmer on their face may, by stipulation, go into evidence as representing repayments to the extent of the amounts of the checks and on the dates that they bear on this eight thousand dollar total amount of loans which Mr. Campbell has mentioned. However, in respect to the first check, which is payable to the First National Bank of Nevada and in no place appears anything pertaining to the charge here, we object to that on the basis it is incompetent, irrelevant and immaterial. We are perfectly willing to take at their face value the two checks which bear the defendant's name.

Mr. Campbell: We will accept the stipulation.

The Court: Very well.

Mr. Golden: Then there will be no testimony by Mr. Weaver as to any conversation he had with Mr. Villaudy.

Mr. Campbell: No, none whatever.

The Court: That ends all question as to any possibility of deposition.

Mr. Golden: Yes, your Honor.

The Court: Let me ask as part of the information for the Court, I do not understand a deposition could be taken of government witnesses. If you notice this Rule 15 (reads rule).

Mr. Golden: Yes, I notice that, your Honor. Of course, the next subsection (b) says the party desiring to take the deposition—

The Court: Then the stipulation takes care of the whole situation.

Mr. Campbell: I do not understand there is any manner in which the government could take the deposition.

The Court: No, I wouldn't think so.

Mr. Golden: Unless we are willing to stipulate.

Mr. Campbell: May I ask the certificates of Dr. Laskey and Mr. Stewart, the medical director, be placed in the official files.

Mr. Golden: May these checks be separated and the one which we have not stipulated to be removed from the exhibit?

The Court: Yes, sir.

Mr. Campbell: May they be given a number, 176A for identification?

The Court: And Exhibit 176 will be admitted

in evidence and will express the two checks mentioned by Mr. Golden.

Mr. Campbell: My understanding of the stipulation, so we may repeat it in the presence of the jury, is that it be stipulated that these two checks represent repayments by Mr. Villaudy on account of his loan in the amounts and upon the dates stated.

Mr. Golden: That is correct, your Honor.

The Court: Are we ready for the jury?

A. Yes.

[Title of District Court and Cause.]

ARGUMENT RE: HYPOTHETICAL
QUESTION

Tuesday, January 29, 1952, 2:00 P.M.

(In the absence of the jury.)

Defendant present with counsel.

The Court: In view of the fact that the jury is not present, we can open the whole question as to all the objections proposed by counsel.

Mr. Avakian: May I suggest, your Honor, you might follow my argument more specifically if you have before you prosecution's Exhibit 165, which is the net worth statement of the Menlo Club presented by this witness.

The Court: I think we ought to hear from Mr. Campbell on his objection.

Mr. Campbell: As well as I can with the question in mind, which contained a great many elements—I will ask counsel if he has prepared writ-

ten copies of the question. Usually in a long hypothetical question, the question is handed in written form to the witness, in order that he may have it.

The Court: I think my notes will help me somewhat here.

Mr. Avakian: Perhaps in the absence of the jury I could put this chart on the blackboard.

The Court: Then you would have to take it off again in the event it is not admitted.

Mr. Avakian: I would be very happy to do that too.

The Court: There is another point that occurred to me, whether or not this is a question which goes to an ultimate point that might have to be submitted to the jury. I do not think that we should have witnesses here deciding the case for the jury. That is the point that I have in mind.

Mr. Campbell: Now Mr. Avakian's propounded question is based upon the supposition that various individuals—he gives them names but in his question refers to them by letters—entered into a partnership in a business purchased by one of the individuals named for 175 thousand dollars on May 1, 1945. Now the evidence in the case shows that any agreements which were drawn were drawn in November of 1946.

Mr. Avakian: May I inject—I did not refer to written agreement.

Mr. Campbell: The evidence further shows that one of the individuals, Mr. Kyne, was in the service in May of 1945 and did not learn apparently of either the acquisition of the business, and specifi-

cally as to any share which he might have in it, until his return from the service, by his testimony, when he was given this written document, copies of which are here in evidence.

The question purports to interpret the documents relative to the acquisition of the lease and premises from Mr. Schriber in the name of the witness Billington, as to what was purchased for the 175 thousand dollars, and is further predicated upon facts which are not here in evidence, in that the question postulates the proposition that a capital account was opened in the name of Remmer, crediting him with 175 thousand dollars. The question goes directly, not only in these respects but in other respects, into matters which must be determined, issues which must be determined, by the jury, and attempts to supply an answer based on counsel's theory to those issues.

I wish further to make the point—I do not have all the elements which were contained in that question, aside from those to which I have referred—his reference to the fact that the agreement provides that Remmer was to withdraw 175 thousand dollars before the others were to participate, and relative to the setting up of this capital account.

Now my objection goes further, that is, it is not within the scope of the direct examination. This witness was not asked the hypothetical question, nor was he asked to give an opinion as an expert witness on any such matters, and I submit it would not be a proper scope for cross-examination, even

though it were a proper subject to inquire into or a proper opinion to seek from an expert called as his own witness.

On the other hand, we are here to determine certain specific matters. This man was called and was asked on direct examination, not as to opinion based upon the findings by others, but what his specific examination, for example, of the Menlo Club, to which counsel has made reference, to what he found in the books and records which are here in evidence. Government's Exhibit 165 is, and purports to be and so testified to be, figures which were drawn from the books here in evidence. The capital accounts at the bottom of the page, and to which I believe counsel was referring, were denominated and were testified to be the capital accounts as shown by the books. The rules with respect, the law with respect, to cross-examination of expert witnesses is generally covered in *Corpus Juris Secundum*, Vol. 32, which I have before me, and which is embraced in paragraphs 549 and following. That—

The Court: You had better give me the page number.

Mr. Campbell: Yes, the page number is page 342 of Vol. 32, continues for a number of pages.

Now the article deals first with where an expert is called, skilled or expert witness, by one side or the other and asked in his direct examination to give an opinion from the facts stated to him, which facts must be in evidence before the Court, although the selection of the facts, if reasonable, can be con-

sistent with the theory of the party that is calling. We are not here faced with that situation, however. Mr. Weaver was not asked for opinions on his direct examination, but was requested to, and did, testify in these matters as to specific entries in the books and records which are here in evidence. He was not asked to give interpretations of partnership agreements or what rights were created under those agreements, either present or future rights, which this question would contemplate and which are a matter not of legal interpretation, but instruction of the court and finally a factual determination by the jury in this case, under the instructions given by the Court.

I submit, your Honor, that upon cross-examination that it is improper for counsel to propound a question of this kind. I do not believe that if the witness were his own witness, the question itself would meet the requirements that all of the elements of the question be in the record, and if it would not meet the requirements upon a direct examination of his own witness, it certainly would not meet the qualifications required under cross-examination, even though it were within the scope of the direct examination, which this question is not.

Upon those grounds, we submit that the hypothetical question, in its present form, is improper, both on the grounds that it includes elements which are not in evidence, includes elements which call for an invasion of the province of the Court and of the jury, the interpretation of legal matters and determination of issues in this case, and finally that it is

not within the scope of the direct examination of this witness.

I do wish to call the Court's attention to one other thing. Referring to the agreements, which are in evidence, specifically plaintiff's Exhibit 130, which purports to be one of the partnership agreements as to the Menlo Club, this particular one being between Elmer Remmer and Harold H. Maundrell. This agreement is dated and reads: "Made and entered into this 4th day of November, 1946," and it nowhere purports to be even a recitation of a prior agreement, oral or otherwise, entered into by the parties as of May 1, 1945, as assumed by the question. It is true the agreement recites that this agreement entered into November 4th, or the assignment set forth there, shall be effective as of May 1, 1945, but the question assumes that an agreement was entered into on May 1, 1945, which is contrary to the evidence in this case.

Mr. Avakian: Your Honor, first of all may I respectfully disagree with Mr. Campbell's statement that on direct examination this witness was not expressing opinions, but was simply eliciting evidence that he had extracted from exhibits in the testimony, and if you will refer, your Honor, to Exhibit 165, I can call your attention to the particular things which represented, not extracts from testimony, but rather the results of Mr. Weaver's accounting analysis, with the result that he came up with things which were not covered by any previous testimony or by any other exhibit.

Let us take, for example, the item which is on the

10th line of the assets: "Improvements in 1945. Exhibit 133K \$920" and "Improvements in 1946, Exhibits 134-135 and 136, \$2,355.16." The exhibits that are referred to there, your Honor, go to the checks which show the expenditures for these particular amounts, and in the books of the Menlo Club these expenditures were deducted as current expenses. Mr. Weaver, in preparing Exhibit 165, determined that those should not be treated as current business expenses, but rather should be treated as capital items and so he capitalized them and set them up as assets. Now there is no other evidence, besides Mr. Weaver's testimony, that those were capital assets. The books do not treat them as capital assets. Mr. Weaver, as an expert accountant, based upon his own opinion and judgment as an accountant, determined that these should be treated as capital assets. Now that, your Honor, is not extracting a figure from an exhibit and putting it in a summary. That rather is a conclusion reached by him in his capacity as an expert.

Then let me go down farther, your Honor. Under liabilities there is the matter of reserve for depreciation. Now there is nothing in the books, or in other evidence, that contains any of those figures or that item, your Honor. That represents Mr. Weaver's judgment as an accountant, that on the facts which have come into this case, the particular expenditures, which were treated as current expenses, should be capitalized and reserve for depreciation should be set up in respect thereto. Those are two items in which he exercises judgment as an expert.

Let me go on, your Honor. He listed as an asset of the Menlo Club partnership——

The Court: Suppose you could find four or five more of the same example, I can't see why the mere presence of those—my question is, they are computations which I think he stated were put there through his understanding of proper accounting practice, how they could at all be the basis for a hypothetical question that would refute in total what purports to be a considerable quantity of evidence and present the question which is one of the questions which the jury in this case will have to answer.

Mr. Avakian: I do not think the question of intent to evade would be any ultimate question the jury would have to answer. The jury would have to answer the ultimate question of what was correct accounting of this taxpayer and what was the correct tax liability based on that income. The questions I asked of this witness are, under correct accounting practice, under this set of facts I have stated to him, what would be the proper accounting treatment of certain items I am going to ask him about, certain things that occurred. Now I made my first statement prior, your Honor, on this matter in answer to Mr. Campbell's statement that Mr. Weaver was not exercising his own judgment in his examination or in his exhibit, but simply extracting figures. Perhaps I should make this statement of the matter under which I consider this is proper. I am quoting now from Wigmore, Third Edition, Vol. II, Sections 682 and 684. I will read them in that

order; Section 682, which deals with hypothetical questions of witnesses says: (Reads section.) And Section 6846, headed, "Hypothetical Questions on Cross-Examination," reads as follows: (Reads.) My understanding of that, your Honor—and that is taken from Wigmore, but that is my understanding the uniform rule of application in questioning witnesses.

The Court: Will you read that statement again.

Mr. Avakian: (Reads.)

The Court: All right—judgment of germane matters, on matters germane to the direct examination.

Mr. Avakian: That is right, your Honor.

The Court: Now he hasn't answered any question on direct examination which could be considered an opinion as to the effect of a considerable quantity of this evidence.

Mr. Avakian: Yes, your Honor he has, and may I explain it in this way. I think we all recognize that the hypothetical question which I asked, and which if the Court permits me I intend to chart on the board, relates to the Menlo Club. Mr. Weaver presented an exhibit which purports to be a net worth statement—

The Court (Interceding): If you want to ask some hypothetical question that had some relation to the matters which we see in Exhibit 165 of accounting opinions or deductions, it certainly would be within the scope of the direct examination and it would not in any manner invade the province of the Court or the jury.

Mr. Avakian: Your Honor, that is what I want to do. I only ask this indulgence, that the Court give me some liberality in analyzing and selecting here of my questions and to indicate to the Court, in the absence of the jury. One of the things I want to get at, which relates primarily to this exhibit and which represents my contention that this exhibit which he prepared is not correct accounting practice is this item he showed as asset of the Menlo Club, the partnership, 175 thousand dollars as the cost of it. Now the books of the Menlo Club show a liability against that asset, depending on which of the two sheets are taken, either 100 thousand or 125 thousand at the end of 1945.

The Court: An answer to this question would not be proper.

Mr. Avakian: What I am trying to do is to explain the subject I am going into, so you will understand what I am going into is germane. The witness testified that notwithstanding the fact that the books of the Menlo Club did show that liability, he omitted the liability from Exhibit 165 on instruction of Mr. Campbell, and he specifically stated that an accounting justification for omitting the liability was that the transaction with Mr. Schriber, by which that liability with Mr. Schriber was incurred, was a transaction personal to Mr. Remmer and not a transaction to the Menlo Club. Now, your Honor, I believe if I am permitted to ask this witness a series of questions, upon which I want to be heard, that he will answer under proper accounting practice if one of the partners individually has assumed

a liability for an asset which he contributes to a partnership, and if that asset then is treated as a partnership asset in the partnership balance sheet, a corresponding entry should be made, crediting the capital account of the partner who had personally purchased the asset and was contributing to the partnership. In other words, what I want to show through this witness is that, having determined, as an expert, that he should eliminate from his partnership net worth statement a liability shown on the books that it was a private liability of one partner, he should then be consistent and make a corresponding adjustment in the capital account of the partner whom he considers having the personal liability, to give that partner credit for having contributed the asset to the cost.

Now it is fundamental, you might say, in accounting that one entry calls for a counter entry. You cannot give the partnership credit for an assist without showing something in the liability side somewhere. Now the books show the liability as a partnership liability. Mr. Weaver says, "No, I conclude"—or at least Mr. Campbell concludes—"that that was a personal liability to the partner, not partnership liability, so I am eliminating it." All right, your Honor. It is eliminated, but if, as a matter of proper accounting, the elimination of that liability as a partnership liability, would call for including a corresponding adjustment to a capital account, then wouldn't it be proper to show that?

The Court: Have you inquired of the witness on cross-examination as to whether or not that

should have been considered as a credit to Mr. Remmer?

Mr. Avakian: To his capital account?

The Court: Yes.

Mr. Avakian: That was the very question that I put to him?

The Court: Can't you do that with a hypothetical question?

Mr. Avakian: No, we cannot, for this reason—the question is meaningless except in a context of facts, so we have to set up a factual factor. In this hypothetical assumption I have made, I am assuming the same thing that Mr. Weaver and Mr. Campbell assumed, namely, that Mr. Remmer, through a personal transaction with Mr. Schriber purchased the club. All I want to show is this, by this particular question, that if Mr. Weaver was correct in assuming that liability to Schriber was not a partnership liability, but Mr. Remmer's personal liability, then he should have made another adjustment in preparing this net worth statement. Your Honor will recall that I tried to go into this on voir dire at the time this was offered and the objection was made to it that those questions as to that matter were not proper voir dire, and I would like to read a few of the statements——

The Court (Interceding): I think it would be proper cross-examination.

Mr. Avakian: Your Honor said it would be proper cross-examination and you would allow——

The Court: But I do not think this is right.

Mr. Avakian: On page 2986 it says—as to

whether hypothetical question is proper, I call your Honor's attention again to Wigmore, the statement that it is proper in cross-examination of one who takes the stand as a skilled witness to test his judgment upon germane matters.

The Court: Take this question as a whole, sum it all up, it doesn't amount to a germane matter brought out on direct examination.

Mr. Avakian: Your Honor, it relates specifically to Exhibit 165 and adjustments he made of it.

The Court: I am going to sustain objection to the question. Going back to that question of voir dire, if there was anything in this Exhibit 165 which amounts to a conclusion as to what proper accounting practice is, or amounts to this witness' opinion as an expert, I think you are entitled to go fully into it on cross-examination.

Mr. Campbell: I agree to that, but not in this method.

The Court: Not in this way. I do not believe you should get before this jury a question which embraces a considerable portion of this question and then have this witness, on the assumption of certain parts, give an opinion. You could put one or two more witnesses on here and send the jury home—the case has been decided. In other words, it is invading the province of the jury.

Mr. Avakian: Your Honor, perhaps while the jury is out it will save time if I could ask further clarification of the Court on that point.

It has been my understanding—I want to be corrected if your Honor disagrees with me—it has

been my understanding to offer an expert witness to testify as to matters of opinion and judgment, and if that opinion and judgment is exercised on the basis of any set of facts covered by the evidence—it cannot go beyond that, but based on his analysis and judgment of any set of facts in evidence—that it is proper in cross-examination of the witness to ask him to assume a different set of facts, likewise in evidence but bearing on the same point, and ask him what his conclusion would be based on that set of facts, and I think these quotations from Wigmore which I just quoted specifically cover that, but I want to be guided by the rules of this court, and that is why I am asking.

The Court: I think Mr. Campbell—perhaps he will—will agree that there are some items or figures in Exhibit 165 which are determinations of this witness in the exercise of what this witness considers proper accounting practices, isn't that true, Mr. Campbell, or is it?

Mr. Campbell: I think that is true of one or two items.

The Court: Some of these items that you mention, this 10th item, improvements and so on, capitalization of that, I think it is perfectly proper for you, on cross-examination, to inquire into this witness' method of arriving at that conclusion, and if you have a different theory as to the application of that 175 thousand dollars, whether it should be a credit to Mr. Remmer personally, go into that and discuss that with him.

Mr. Avakian: Your Honor, would it be proper

to ask this question—if I ask the witness to assume an agreement between the partners, whereby one of the partners would contribute to the partnership an asset worth 175 thousand dollars, would it be proper then to credit capital account of that partner with 175 thousand dollars.

Mr. Campbell: I suggest that that is not the proper method of approaching it. The witness should be asked why certain figures were used here if they are not within the books, and then that question explored and if counsel has then a different theory of what the books or the records or the sources from which he drew it, if he has an opinion, proper questions can be put testing the validity of that, but to do as counsel would propose with these various assumptions, which include interpretations of documents that may or may not, depending on the witness' answer, have been taken into consideration, is a different subject.

The Court: I think we had better stay on this one point we have under discussion. I will sustain the objection to this question and we will meet these other matters as they arise. I realize that cross-examination has a wide scope and I do not want to improperly restrict it.

Mr. Avakian: I think your Honor appreciates the importance in this case of the particular points we are exploring now and I think your Honor is also aware of the fact that testimony of an expert witness is generally recognized by the courts as relating to matters which the jury must ultimately decide.

The Court: When you talk about expert testimony, I want to see what there is in any of these exhibits or any direct testimony which amount to opinions.

Mr. Avakian: No, what we want to cover in addition to that is this, when the witness bases opinion upon a certain set of facts, I think the government witness has been basing his judgment on opinions, which opinions may be correct, I am not criticizing the correctness of the method, but opinions which are based on facts favorable to the government, if the evidence would permit a different interpretation also, we want to know whether he, as an expert, would reach a different answer, on expert judgment, if the facts are found by the jury to be not facts he assumed, but a different set of facts covered by the evidence. Then the jury would know whether there was disagreement between experts on matter of expert judgment, or simply disagreement between them on the facts they assume at the basis of forming their opinion.

Mr. Campbell: It seems to me we will have to reach those difficulties when we come to them.

The Court: Well, I think so. The objection to this question is sustained. We will take a short recess for about 10 minutes.

(Recess taken at 2:40 p.m.)

[Title of District Court and Cause.]

OFFER OF PROOF RE: REGULATIONS OF
SECRETARY OF THE TREASURY

Wednesday, January 30, 1952—10:45 A.M.

(In the absence of the jury.)

Defendant present with counsel.

Mr. Avakian: Now, your Honor, in addition to the particular question that I raised to this objection, I also plan, if the Court will permit me, to ask with respect to the witness' familiarity with certain other sections of the regulations. Would it be proper to include those with our offer of proof while the jury is out?

The Court: All right.

Mr. Avakian: And then if your Honor would care, while the jury is out, I would like to state our position to the Court as to why we think it is material and proper.

The Court: Very well.

Mr. Avakian: Our offer of proof is to show that the Secretary of the Treasury had issued certain regulations under the Internal Revenue Code, entitled generally Regulations 111; to show that under Section 29.23(a)-1 of those regulations it is provided that incidental repairs are deductible as business expenses; to show that under Section 29.23(1)-1 the proper allowance for depreciation of depreciable assets is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan, not necessarily at a uni-

form rate, whereby the aggregate of the amounts was set aside plus the salvage value to allow at the end of the useful life of the depreciable property equally the cost or other basis of the property determined in accordance with Section 113; to show that under Section 29.23(1)-2 the necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a plane where its usefulness is exhausted and the allowance should be confined to the property and the allowance for depreciation applies to property which is subject to wear and tear, decay, decline by natural causes, exhaustion and obsolescence, due to the normal progress of the art, as where machinery or any other property must be replaced by new inventions, or due to the inadequacy of the property to the growing needs of the business. And in addition to showing these provisions of the regulation, to show this witness' familiarity with the application of those provisions, to show that this witness, as an expert in the field, knows that there is necessity for exercising judgment in determining, first of all what particular expenditures should be utilized as a depreciable asset, and secondly, to show the necessity for exercising judgment in determining the life of the property over the period of which the depreciation deduction is to be spread, to show the various factors that enter into the exercise of that judgment, to show that the common experience of himself and of the Bureau of Internal Revenue, to the extent that he knows it, is that there is frequently

disagreement among experts and frequently disagreement between the Bureau of Internal Revenue and the United States courts as to just how and in what respect that judgment should be exercised in any given facts existing and through this showing, your Honor, to develop the fact that it is possible for taxpayers to be in error on matters of this kind, simply through the exercise of incorrect judgment, as distinguished from the existence of any fraudulent intent.

Another purpose of our offer is to determine the qualifications of Mr. Weaver as an expert witness on these matters where he admits he has exercised judgment, by testing his familiarity with the regulations and by testing his familiarity with the experience of the Bureau of Internal Revenue with respect to such problems.

Now in connection with the offer and explanation of our purpose of it, your Honor, I want to call attention to the fact that there are two ultimate issues which are to be decided by the jury in this case. One is the question of the correct amount of Mr. Remmer's income during these three years. If we were dealing only with that question; in other words, if this were a civil question, in which the only issue was to determine how much taxes were due, no question of intent at all, then, of course, it would be proper to restrict the proof to questions of what is the proper accounting in this case and to determine that answer and that answer alone, but we have here another issue, and that is the issue of whether, if there is shown to be

any deficiency, that deficiency resulted from any fraudulent intent on the part of the taxpayer to defraud.

Now it may be, and it is frequently the case in tax evasion cases, that there is a deficiency, but there is no fraud, there is no intent to evade. The question of intent to evade will have to be determined in this case and I think it is quite apparent, at least principally and perhaps entirely, on the basis of circumstantial evidence. Now the courts have held that the matter of whether a deficiency was due simply to neglect or to incorrect application of the law and so on, is material in determining whether the circumstances show fraudulent intent. In other words, your Honor, one of the circumstances which could indicate to the jury that any deficiency which they might find to be due was not fraudulent, was not due to any intent to defraud, is the fact that the deficiency arises, in part, from adjustments made of a kind which are subject to judgment and in which common experience shows disagreement between experts as to how the judgment should be exercised.

The particular significance of it is this, your Honor—these particular items that Mr. Weaver has capitalized for the Menlo Club amount to approximately \$3200 and another item on this exhibit, which falls in somewhat the same category of the expenditures made at 50-52 Mason Street, amount to a total of approximately \$8600.

Mr. Campbell: On this exhibit?

Mr. Avakian: Yes, it is in the accounts receiv-

able item, which is explained in detail by another exhibit. So these two items together, your Honor, total almost \$12,000 and by capitalizing that \$12,000 of expenditures, the government is increasing by \$12,000 the amount of income that will be computed for the three-year period in question on the net worth method. Now suppose, your Honor, that the jury finds that there is an understatement of income in this case of \$12,000. Then the whole case would turn, your Honor, on whether there was any fraud in connection with that understatement of \$12,000. Now we feel it would be proper for the jury to have before it, in considering the question of intent, the circumstances of whether the \$12,000 that Mr. Weaver has added to the net worth computation by capitalizing these expenditures, represents a matter of judgment, on which there is no clear-cut defined or positive rule to be applied, but rather on which there is simply a general rule, as indicated by the term "Incidental repairs." The word "incidental" we all know is not specific but rather generic. Mr. Weaver has used the term major repairs, should be capitalized. The distinction between major and minor is likewise generic rather than specific. It would be proper for the jury to have before it the fact that \$12,000 of the income which has been built up by the government in its net worth computation does represent application of rules of judgment upon which experts disagree and upon which the regulations themselves set up general rather than specific lines of demarcation.

Now I do not want to be understood, your Honor, as contending that in the matters that we desire to go into we are going to challenge the correctness of the allegations and the capitalizations which Mr. Weaver made. That is not the purpose of this questioning. The purpose of the questioning is to show that these things which he did do, which have the effect of increasing the amount of income that is going to be computed by the government on the net worth method, represent an area in which the exercise of judgment is essential.

Now your Honor will recall that we had some discussion earlier in this trial regarding the matter of the scope of cross-examination of expert witnesses and I guess on two or three occasions we have gone into that. Your Honor stated to us on those occasions that where it was shown that an expert witness had exercised judgment, you would permit us to cross-examine the witness with respect to that matter. Of course, on those occasions we did not have before us these particular matters, but it occurs to us that the cross-examination of the witness in the manner in which we desire to proceed would fall within the principle that your Honor stated here earlier, to the effect that where the expert did exercise judgment, you indicated that you would give us fairly liberal opportunity to cross-examine regarding the matter. We tried to draw a parallel, your Honor, of cross-examination of a medical expert. If a doctor is on the stand and he is testifying regarding his judgment and conclusions, it is proper to ask him if he is

familiar with a certain work in that field. Now that is proper for two reasons—one is that it tests his qualifications as an expert, by showing the extent to which he is familiar with the literature on the subject——

The Court (Interceding): May I understand, Mr. Avakian, just what is the substance of the question that you would like to propose to bring out the points of your offer here?

Mr. Avakian: First of all I would like to find out whether the witness is familiar with the provisions of the Treasury regulations that deal with the particular matters to which he has exercised judgment. In other words, your Honor, as he himself stated yesterday, the preparation of this exhibit, preparation of net worth statement in this kind of a case involves——

The Court (Interceding): I will be glad to go along with you to that extent, at least as far as there are regulations which necessarily would be brought into use by such an expert witness as we have here in arriving at determination made by him; I will go along with you to that extent.

Mr. Avakian: I think that will probably serve our purpose then, your Honor. I might say this——

The Court (Interceding): But I don't want this witness to instruct the jury as to the law in this case.

Mr. Avakian: I understand that. We do not want that either, your Honor. We do want to find out, your Honor, whether he is familiar with the provisions of the regulations that are applicable

to the particular matters of judgment which he exercised.

The Court: How far would you go along? Suppose his answer was yes. Then you would want to produce the regulation and try to point out to him in what respect he may or may not have properly followed the regulation.

Mr. Avakian: No, I don't think that, your Honor. I would like to read him the particular pertinent provisions and ask him whether he is familiar with them.

The Court: That would not appeal to me in view of the present situation of your argument. How would it be to ask him if he is familiar with certain regulations, referring to them by some denomination which he would recognize; if he did not recognize them then describe it a little more completely. If he said yes, all right; if he said no, all right.

Mr. Avakian: Well, your Honor, I do not think that would serve the proper purpose of bringing out what we consider proper on this question of intent.

The Court: I think the interpretation of these regulations or any section of this statute, if they are going to be made for the benefit of the jury, should be made in the form of instruction by the Court.

Mr. Avakian: I think they should certainly be done that way too, but I think it is proper, your Honor, to ask an expert witness—here is an authentic document as recognized authority in the

field—I think it is proper to ask the expert whether he is familiar with the statement, reading it, in that recognized authority. I will be glad to put the regulations in evidence if that would obviate any objection of your Honor, but the point is this, if this expert is familiar with a particular provision of the statement made in a recognized work in the field, that has a bearing on his qualifications, and we think it is proper to read that statement in that recognized authority to the witness, to ask him whether he is familiar with it and to ask him whether he took that particular Treasury regulation into consideration.

The Court: I will go along with you this far, and I say that without cutting you off—in any case where any of this testimony amounts to a statement of the witness' judgment and opinion, I think you are entitled to examine fully as to what he thinks and you could ask if, in forming his opinion on any of these matters, if he did depend upon or consult or consider any regulations or the statute, but to hand him the regulations and you, as attorney here, engage in a speech before this jury as to what proper interpretation be made of a regulation, of a section, or to have either one of you attempt to instruct the jury as to matters of law in this case, I am not going that far with you.

Mr. Avakian: I certainly would not want to go that far and certainly did not intend to imply that I wanted to.

The Court: I do not mean that you would have

any intention of doing that but you might do something that would amount to the same thing.

Mr. Avakian: Would this be proper—if he did state that he took the regulations into account, would it be proper to state what particular section he took into account and to have him read the particular provision?

The Court: No, I do not want it read before the jury at all. When I say I do not want it read, I mean I do not think it is proper.

Mr. Avakian: I understand that. It has been customary in our experience, your Honor, to be permitted——

The Court (Interceding) For instance, this matter of dispute, which means this difference between courts of interpretations of this law, when we come to settle instructions, listen to arguments and decide those various decisions, then I am going to choose which one of them I am going to follow, but I do not want opinions of a great number, or one or more, different judges, of the different judges of this court, to be presented to this jury.

Mr. Avakian: Your Honor, there is a related matter. The witness made a statement yesterday that under law such and such a thing was required and I intend to question him later with regard to that. The statement was made as a statement of the law and I appreciate an expert witness can't divorce himself from things of that kind, but I had intended to ask him what particular portion of the law he based that statement on and also intended to ask him whether he was familiar with

another portion of the law that relates to that subject, because I disagree with him as to what the law is and I want to test the basis of his knowledge there. For my own guidance I raise the point, so I can approach the matter in a way that would be acceptable to the Court. Would it be proper there for me to show him, without reading to the jury, the particular portion of law that I have in mind and ask him whether he took that into consideration?

The Court: What particular answer have you in mind? What was it?

Mr. Avakian: It is a matter—I forget the exact question, but it is a matter that relates to the circumstances under which a taxpayer may or may not use the cash or accrual method of accounting.

Mr. Campbell: I think that was on cross-examination.

Mr. Avakian: That is right. He made the statement under the circumstances a taxpayer could not use the cash method of accounting.

The Court: That is a matter to be argued before the jury after the case is concluded, or if it is a matter of law, the Court should instruct on it.

Mr. Avakian: That I understand. Would it be proper, without reading anything to the jury to hand him a particular thing and ask him whether he was familiar with that provision in reaching his conclusion?

The Court: No, I do not think so. We are going to have the jury accept its law from the Court, not the witnesses.

Mr. Avakian: There won't be any statement to the jury on that. It would be simply asking the witness whether he is familiar with certain provision——

Mr. Campbell: That is by indirection.

Mr. Avakian: No, your Honor.

The Court: I am not going to permit that. Of course, that is not included in this offer. I will meet it when it comes.

Mr. Avakian: We will, of course, want to make our record on that when the time comes.

The Court: I am not sure you understand. I do not feel that would apply but we will meet that when it comes. This present situation here, we will dissolve that by saying any matters of opinion expressed by this witness, you may inquire as to what he bases his opinion on, but as far as having this witness interpret the law, we won't go that far.

Mr. Avakian: The witness' statement is this—I am quoting from Mr. Weaver's testimony: "Every accounting treatment must, to some extent, be based upon a legal interpretation. I do not see where you can make a distinct dividing line between law and accounting, because accounting treatment necessarily rests on the proper interrelations which are legal matters and as accountants, the accounting treatment must follow whatever legal interpretation they give to certain facts." That means then, your Honor, that the witness himself is admitting that he is applying provisions of law. Now all we want to do is to test his knowl-

edge of the law that relates to that, because if he is applying provisions of law, without having in mind all of the applicable provisions of law, his accounting answers are, to that extent, wrong. Now we do not want to argue between counsel and the witness as to what the law is, but we do want to bring out whether or not the portions of the law that he considered—first of all, bring out what portions he did consider, so we can determine ourselves whether we think he went far enough, and then ask him if he is familiar with other provisions that we think material, without going into the content.

The Court: In other words, the idea that you seem to voice is this, that when he said legal that he meant some specific statute or rule of law. Sometimes people use the word "legal" as a synonym for right, something of that kind, right or wrong or whether proper. I do not know whether he meant it that way or not.

Mr. Avakian: Your Honor, there are particular provisions in the law which relate to the matters to which he has exercised judgment. Now obviously a judgment which is based on provisions of law is not good judgment unless it is based on all the pertinent provisions.

The Court: Wasn't that answer given in response to a question as to how he determined between replacements and capital investments, something of that kind?

Mr. Avakian: That particular answer was given in connection with the decision as to how he should

classify the liability to Schriber, but his statement—you recall I read it—"Every accounting treatment must, to some extent, be based upon a legal interpretation. * * *" Obviously the decision to classify a particular expenditure as current or capital is based upon what the law says you must do in that regard.

The Court: I think we are going too far here. In the first place, this case would resolve itself into a discussion of legal principles.

Mr. Campbell: The question was asked when the witness had testified that he put the particular item in the document under my instruction and counsel was questioning the matter of how he went to me, what advice I gave regarding the repair, and so on and finally in reply to one of Mr. Avakian's questions, Mr. Avakian asked him if he wanted to change his testimony and he said no and volunteered this other information. It seems to me we are straining at gnats in this matter and going into collateral matters that have no bearing.

The Court: This present question, the purpose for which we excused the jury, I think we can allow the question to the extent I have indicated, that on any matters which have to do with any evidence of this witness which constitute his opinion, you may inquire as to the source, what he bases his opinion upon. So we are going to take a recess now. The offer is rejected, except as I have indicated.

Mr. Avakian: Does that mean we can ask him whether he took particular sections of the regulations, without going into it?

The Court: Ask him what he bases it on.

Mr. Avakian: Suppose he states generally the law without being specific, can we then ask him what particular provision?

Mr. Campbell: It seems to me we have to meet those matters as they arise.

Mr. Avakian: That is the purpose of the discussion in the absence of the jury, to straighten this out, so when the jury comes back we can proceed in accordance with the Court's ruling. In other words, the witness may say, "I based it upon law." Are we to stop there or can we show the particular section or provision of the regulations or particular authority which he relied upon and have him cite to us, so we can know and so the record for any reviewing court would show what particular portions of law he bases it on.

Mr. Campbell: It seems to me the witness has previously stated on several occasions on cross-examination on what he bases in analyzing those particular increases—on checks, records and testimony of Mr. Maundrell.

Mr. Avakian: Well, the testimony of Mr. Maundrell does not say this should be capital asset and this is showing he has taken facts as given by the testimony and analyzes those facts and determined that they should be put here instead of there.

The Court: There might be a certain item, or group of certain items, all of which you contend are not capital items. So that is the situation, that we find there are a certain group of items which

the witness has designated as capital and you say they are not.

Mr. Avakian: That is true to a limited extent. As to some items I agree, your Honor, on the question of what should be done, but I want to show the second issue of intent.

The Court: Isn't it contemplated by counsel for both the government and the defendant that some one propose an instruction to the Court explaining that situation?

Mr. Avakian: Yes, your Honor, but we have from this witness statements that proper accounting calls for this, this is the right way to do it.

The Court: All right, suppose he said that and under the law he is clearly wrong. Wouldn't the jury be so instructed in effect?

Mr. Avakian: No, your Honor. That is the point I am trying to get at. If we have a law which said a certain line of demarcation is to be drawn between people 21 years old and those less than 21, your Honor can take care of that in the instructions, but when we have a law which uses generic terms, for the witness to say proper accounting calls for this treatment and to leave it there, without showing that provision that he relies upon is section so and so, and the Court can later on instruct the jury that section so and so contains a generic——

The Court (Interceding): Suppose he says, "I base this opinion upon my interpretation of the section." You can ask him what regulations, point it out.

Mr. Avakian: Yes, that is all right.

The Court: I do not see anything wrong so far, but I do not want that read to the jury and have discussions of whether his interpretation is correct or yours is correct.

Mr. Avakian: We will accept that ruling, your Honor, and abide by it, but we feel—

The Court (Interceding): If it gets here where it gets right down to a situation where one of his entries on one of these exhibits is based upon his interpretation of the regulation or a statute, you can ask what regulation or statute did you base it on.

Mr. Avakian: I want to make it clear for the record that my own personal feeling is that it would be proper to go farther, but of course I am going to accept the Court's ruling and be guided by it and not go beyond what your Honor has indicated. To the extent that your Honor has ruled on that, our offer of proof is denied and in part is granted, is that right?

The Court: Yes. We will take a recess for 5 minutes.

(Recess taken at 11:20 a.m.)

January 30, 3:00 P.M.

(In the absence of the jury.)

(Defendant present with counsel.)

Mr. Avakian: Your Honor, I understand at this time I may make the offer mentioned earlier.

The Court: Yes, sir.

Mr. Avakian: In that connection, your Honor, the defense offers to prove, through the examination of Mr. Weaver, that approximately in May of 1948 the business of the Menlo Club was terminated, as a result of action taken by the San Francisco Police Department, pursuant to an interpretation made by the District Attorney of the City and County of San Francisco, at or about that time, to the effect that the business conducted by the Menlo Club was in violation of an ordinance which had been on the ordinance books of the City and County of San Francisco for many many years, approximately 43 years, and which had not previously been interpreted in such a manner as would make that business unlawful, and our purpose, your Honor, in desiring to prove that is that the amortization deduction taken in the Menlo Club return and reflected in the net income which has been reported by Mr. Remmer in his 1946 return, which is in issue here, was based in part on the possibility that action of that kind by the public authorities might be taken, in justification of the use of a five-year amortization as set forth in the return.

Mr. Campbell: To which we object, in the first place that it is not material and competent and cannot be proved by a witness of this kind, and further contemplation of such action would not be a matter of contemplation in 1946.

The Court: Further, I can hardly see how it would be proper cross-examination.

Mr. Campbell: No, that is correct and not within the scope of direct examination.

The Court: The offer is rejected. Call in the jury.

Mr. Avakian: May I take up one more matter?

The Court: Yes.

Mr. Avakian: I am not entirely sure that I understood your Honor correctly when your Honor made this statement, but I believe the statement was made from the bench during the examination of Mr. Weaver, to the effect that your Honor hoped to get through with this examination pretty soon.

The Court: No, I hoped that we had reached the end of the examination as to his qualifications.

Mr. Avakian: Well, I just did not feel it might be proper in the presence of the jury to imply that we were dilatory.

The Court: I do not think that implies any dilatoriness on the part of counsel. The only thought I had was I wished we would get through with that part of the cross-examination.

Mr. Avakian: I have never been accustomed to the practice, your Honor, where a witness testified at length on a number of matters of having to test his qualifications on all those matters before I cross-examined specifically. It was my understanding when you came to a specific matter, you could test his qualifications on that matter.

The Court: What is your problem?

Mr. Avakian: I fear the jury may be prejudiced by your remark that you hoped we would reach the end of the particular matter.

The Court: I do not believe the jury even heard it or noticed.

Mr. Avakian: We just thought we would have to call it to your Honor's attention.

The Court: I will call it to your attention as I have on four or five or six occasions, attempted to admonish the jury and instruct them that they are not to decide this case on any exchanges between the Court and counsel or between counsel or upon anything except the evidence, oral or written, admitted in evidence. I have told them so many times and I think we have an intelligent jury and I feel certain that they will not decide this case on anything else and I will find occasion, before the trial is over, to call that to their attention.

Mr. Avakian: We thought we ought to note our exception to the matter as promptly as we could, your Honor. That is all, your Honor.

The Court: Call in the jury.

Thursday, January 31, 1952—10:40 A.M.

(In the absence of the jury.)

(Defendant present with counsel.)

(Last question read.)

Q. If we assume, as you have assumed, that the Menlo Club was not a partnership but that it was a sole enterprise of Elmer Remmer, and if we assume further that Mr. Maundrell's employment there was on the basis of a fixed salary plus 10 per cent of the profits of the business, and if we assume further that the Menlo Club was on the accrual basis of accounting, would the Menlo Club not be entitled

to a deduction in amount of the annual salary paid to Mr. Maundrell plus the 10 per cent share of the profits to which he was entitled under his agreement?

The Court: Very well, Mr. Campbell.

Mr. Campbell: The basis of my objection is, as heretofore stated, that it assumes facts not in evidence. I am referring first to the assertion that you have assumed that it is not a partnership. The testimony on that point is the witness, in response to one of counsel's questions, said it was not a true partnership, that is true, but it goes on to assume that the books of the Menlo Club were on an accrual basis, which has been the subject of considerable testimony this morning, that they were on a cash basis and could not be on the accrual basis by reason of the lack of and non-existence of certain records.

I make my objection further on the grounds that the question itself not only assumes matters not in evidence here, but is also not within the scope of the direct examination of this witness.

The Court: Mr. Avakian, the thought I had when I sustained the objection, I thought there was no evidence here to support the assumption that the books were on an accrual basis.

Mr. Avakian: Here is the basis for the question, your Honor: The witness has testified that proper accounting, where inventories are a factor, as is the case in the Menlo Club, will under the regulations call for the use of the accrual method of accounting.

The Court: Repeat that statement.

Mr. Avakian: The witness has stated that under Treasury regulations, where inventories are a factor—and they are a factor in the Menlo Club, as the evidence shows—the regulations require the use of the accrual method of accounting. That was his testimony this morning. Now, as your Honor stated yesterday, the duty of an expert witness is to do what is proper on the evidence, whether for or against the taxpayer, to do what is proper from an accounting point of view, so if the witness is correct in his statement that the Treasury regulations require the use of the accrual method of accounting, that in order to construct a proper net worth statement, of the Menlo Club of that business, we would have to cure any deductions he had during the periods of time that were covered by the net worth statement.

The Court: Let me make an observation at this point. I do not understand the evidence to show they were so kept. It may be true that the regulations require keeping in that manner, but if they were not kept in that manner, how could you say that it is proper to assume that they were kept on the accrual basis in this question?

Mr. Avakian: My point is this, your Honor. It is apparent from the statement your Honor made yesterday that expert witnesses should make whatever adjustments were proper. This witness has, your Honor, made certain adjustments in preparing net worth statements of the Menlo Club, which differ from the books. He has ignored certain things that were in the books, on the theory what he did was

what proper accounting calls for. If I may go first to what the benefit would be and then get back again to the basis, perhaps I could make myself more clear.

The Court: Well, the point that is bothering me, I don't understand that these books were kept on the accrual basis.

Mr. Avakian: He testifies they were not kept on any truly consistent basis and he says the return was prepared in part on the cash basis and in part on the accrual basis.

The Court: Then you can't very well assume that they were kept on the accrual basis in the questions.

Mr. Avakian: What I am asking him to do is to construct for me the net worth statement based on the use of the accrual method. I do not remember the exact wording of the question, but that is the theory of the question.

The Court: That is where this last point made by Mr. Campbell comes into operation, not proper cross-examination.

Mr. Avakian: Your Honor, may I answer on that?

The Court: Yes.

Mr. Avakian: It is proper cross-examination, your Honor, because this witness has himself first of all, in preparing Exhibit 165, assumed that the Menlo Club is not a partnership, but is a sole enterprise of Mr. Remmer's, and although Mr. Campbell made a statement to the contrary, I would like to recall to your Honor's attention the fact

that Mr. Weaver's justification for excluding the liability to Schriber from Exhibit 165 was that the Menlo Club was Mr. Remmer's entirely separate business and not a partnership, and therefore it was immaterial whether you show his personal liability to Schriber in that exhibit or somewhere else and he even offered, "I will be happy to write it in Exhibit 165 if you want," so his justification, your Honor, for his method of constructing Exhibit 165 is that this was not a partnership. Now we would like to show to your Honor that if he is correct in that, if that assumption of his is correct, that the Menlo Club is not a partnership, then on the accrual method of accounting, which he has said is the proper method that should be used here, there should have been certain adjustments made which would have resulted in Mr. Remmer's net income from the Menlo Club being exactly the same as shown on the partnership return.

The Court: I did not understand him to say that the regulations require that the net worth had to be on the accrual basis. It was the accounting should have been kept on the accrual basis.

Mr. Avakian: It is the same thing, your Honor, and after all what he is doing here by the net worth method is trying to compute the correct income and the net worth computation has to take into account either the cash or accrual method or it has no meaning. You can not take a taxpayer who is on the cash basis and reports on receipts and disbursements and make a statement on accrual basis and have any comparison. They are not com-

parable, so when you use the net worth method, you have to be consistent in using either the cash or accrual method. You cannot compare cash accounting with accrual accounting and make any comparison. It is meaningless.

Now the witness did say the Treasury regulations require the use of accrual accounting, so I would like then, your Honor, if that is his position, and since that is a part of his education and training which forms the foundation for what he has done here, I would like to have him tell us what the result would be if he did apply the accrual accounting and if he did apply his assumption that this is Mr. Remmer's sole business, because that would mean then, your Honor, that the obligations to Maundrell at the end of 1946, which were actually paid in 1947 and 1948, would be cured as deductions as deductions in 1946. In other words, if I may put it this way—during 1947 and 1948 Mr. Maundrell actually took out of that business and put into his own pocket, or used for his own benefit, \$15,000, which was assigned to him as his share of profits of 1945 and 1946. Now on the cash method—

The Court (Interceding): We are getting back to discussions we had earlier in the trial on proper scope of hypothetical question. I think a hypothetical question should be based on facts in evidence.

Mr. Avakian: That is right, your Honor.

The Court: And it might vary to some extent. There might be qualifications to that. The theory of the part as to the effect of the evidence might be

incorporated as a part of a hypothetical question, but there is no evidence in this record that these books were kept on an accrual basis.

Mr. Avakian: No, your Honor, the evidence in the record with regard to inventories and other entries in the books are the basis for Mr. Weaver's conclusion that the proper accounting method to apply to these facts in the record is the accrual method. That is based on the inventories here and the records that are here. He is simply applying the proper accounting procedure to the evidence in support that the accrual method is the method that should be used. Now if this is Mr. Remmer's own business and not a partnership, he was certainly entitled at some time deduction for the \$15,000 paid to Maundrell. On the cash method he would be entitled to that deduction when he actually paid it in 1947 and 1948, but on the accrual method he would be entitled to deduction in 1946 when the obligation arose. That is the whole thing in a nutshell, your Honor.

If Mr. Weaver is correct in his two assumptions—and I call your Honor's attention to the fact that they are his assumptions, his hypotheses—on the basis of assumptions which he has made as an expert accountant, then these additional adjustments should be made to the extent which would result, your Honor, in allowing, as a 1946 deduction, the amount credited to his account as his share of the profits which is Mr. Maundrell's account and subsequently paid to him. It is simply when I made my deductions. In other words, if I

were to pay my employees in January for services performed in December, if I were on the accrual basis, I would deduct it in December; if I were on the cash basis, I would deduct it in January. It is a question of when you deduct it. The fact of the deduction is there either way. At some time that deduction has to be allowed. Now, if Mr. Weaver is correct in his assumption—and I repeat, it is his assumption, his accounting hypotheses of how it should be done with this evidence—then I want the opportunity, your Honor, to show that under his hypotheses, correct accounting would call for accruing at the end of 1946 a deduction or liability, which would have the effect then of reducing the net worth and, your Honor, would have exactly the same effect as if a partnership were recognized, so we come out exactly the same way. You can see the significance of that, your Honor, and the importance to us of having an expression from a government witness as to whether on his own hypotheses certain things should be done. It is simply to cross-examine on his own hypotheses to get the full story, not just half of it, your Honor, but the full story of how this should be set up if he is correct in saying (1) this is not a partnership, (2) that the facts in this case call for application of the accrual method of accounting.

Mr. Campbell: If the Court please, I think counsel is incorrect in his statement of the evidence as to whether or not the testimony, particularly the testimony of Mr. Weaver, shows that the books

were kept on the cash basis and not on the accrual basis.

In response to counsel's questions, it is true Mr. Weaver said that in a business of this kind and under the regulations, they should have been kept on the accrual basis but they were kept on the cash basis and it is on the basis of these records that he has constructed Exhibit 165. Now he has stated that the only items which appear on here, on 165, and upon which he exercised any judgment or made any classification, were with respect to certain expenditures which went into acquisition of capital assets and against which he set up a reserve for depreciation. That is, that all of his items are as set forth on the books, including at the bottom the capital accounts as shown in the books for the partners. Now it is true in response to counsel's question, when Mr. Weaver was asked about it, he gave his opinion that this was not a true partnership, but counsel now it appears, by this question, he wants Mr. Weaver to reconstruct a set of figures for him and to construct it on an accrual basis which was not used by the taxpayer or by his accountants, according to the testimony, and without there being before us any record or available in the record accrued accounts receivable and accrued other matters, which would have to be used to offset any liability which counsel is not seeking to accrue. I submit if the evidence is admissible, it must be produced on behalf of the defendant. This witness cannot be asked on a hypothesis of this kind and in the state of the

record and with the evidence which is before him, to completely reconstruct on the stand—which would be necessary to do—he may have had simply one liability, as he says, in accruing a liability, such as liability to pay taxes, withholding taxes, you have an offsetting asset of the amount of money which has been accrued out of employees' paychecks. As shown by his testimony, he has taken the records which are here, he has taken the basis upon which those records were kept, for the purpose of producing this exhibit, and I submit it is not proper cross-examination, nor within the scope of cross-examination, to have this witness reconstruct a set of books for the defendant, which this question would require. I submit that the question assumes facts which are not in evidence here, would require the assumption of records, if the answer was to be complete, which are not now before the Court, if in fact such records are available, and therefore that the question is incompetent in its present form.

Mr. Avakian: Your Honor, I wish to make two observations. In the first place, Mr. Weaver did use the accrual method in preparing Exhibit 165, to some extent at least, because he included inventory. Now you will recall his own statement, that where inventories are a factor, the regulations call for the use of the accrual method, and we can reverse that, that the use of an inventory is itself the use of accrual method, so by including inventory in Exhibit 165 Mr. Weaver has, at least to that extent, in his own exhibit made use of the accrual method.

Secondly, your Honor, it was not upon my invitation that Mr. Weaver made the statement that he did not consider the Menlo Club a partnership, rather it was an explanation of Exhibit 165 and in justification of it that he said that he did not consider it a partnership, and specifically, your Honor, he said, as a justification for omitting from Exhibit 165 the liability to Schriber, that it did not make any difference because he did not consider the Menlo Club a partnership, so that it is a part of his direct testimony. Your Honor, if you will look at his Exhibit 165, which is direct testimony, inherent in Exhibit 165 is his assumption that this is not a partnership and expressed by him on the witness stand as one of the bases for the exhibit was his direct statement that he did not consider it a partnership, so I am simply seeking, your Honor, to complete the picture on the things which he, himself, has brought into this case, certain assumptions which he himself has made.

Now, the uncontradicted testimony in the case—and it is all from government witnesses—is that these were partnerships, but the prosecution is apparently taking the theory that, notwithstanding that testimony, the jury should, by inferences, conclude that these were not real partnerships and Mr. Weaver has indulged in that inference in presenting Exhibit 165. Now, your Honor, if the prosecution has gone beyond the scope of the evidence in making that assumption, then obviously their own hypothesis was improper and should be stricken from the record. If, on the other hand,

their hypothesis that this was not a partnership is a permissible inference which may be drawn from the evidence, then we are entitled to cross-examine him on that hypothesis, particularly, your Honor, since it is their hypothesis and not ours. We just want to complete his picture, your Honor, we don't want this in the exhibit half way. We want to show that if we take their entire theory of the evidence, we still wind up with the result that was the same as the tax returns that were filed.

We hope your Honor won't cut us off from that because this is a crucial question here. We should have, for the benefit of the jury in their determination of these accounting problems, what the correct accounting result would be, according to the government accountant if his hypotheses were carried out to its proper accounting conclusion.

Now if there is any doubt in your Honor's mind about the propriety about this, may we respectfully suggest to your Honor that particularly in a criminal case the defendant should be permitted reasonable leeway in exploring these things and examining government accountants. I do not think the question is unfair to the prosecution. I think it is within the scope of assumptions the prosecution has made in presenting this witness, it is within the bulwark of the manner in which Exhibit 165 was constructed, it is within the bulwark of Mr. Weaver's statement as to what method of accounting is the proper one to use. Now the Court necessarily has to exercise some discretion in mat-

ters of this kind because until you finish your case and can look back over it and fit every little thing into the complete picture, nobody can be absolutely sure as to whether a particular item of evidence was material and proper or not. Your Honor must exercise some discretion as we go along in that respect, and we are simply asking your Honor to be generous with us in that respect and to permit us to inquire into these matters, because of the importance to the defense of showing just what the result would be if the government accountant did continue further with the hypothesis which he has applied in his examination.

The Court: Let me have the question, please.

(Question read.)

The Court: Was on the accrual basis—if you assume that, I will allow that to be asked.

Mr. Avakian: In other words, if we modify to say if we apply the accrual method of accounting?

The Court: No. So the ruling that was made will be reinstated.

Mr. Avakian: I think I can modify the question.

The Court: If you will not accept it, the ruling will stand and the objection is sustained.

Mr. Avakian: I want to modify the question to eliminate——

The Court (Interceding): We will take a five minute recess. We will do that later on.

3:30 P.M.

Defendant present with counsel.

Jury absent.

(Last question read.)

Q. Isn't it true, Mr. Weaver, that you, and the other members of your staff, refused to return those records to the defense when the defense requested the opportunity to examine them in October of 1951 for the purpose of preparing for this trial?

The Court: What former ruling of the court was made on that?

Mr. Campbell: I am referring, may it please the Court, to the motions which were produced and made before this Court for the inspection of certain records and requesting a continuance of the trial. At that time there were placed before the Court the affidavits of both counsel for the defense and counsel for the government.

The Court: And motions were not made until a week or so before the trial.

Mr. Campbell: And that is referring at that time in October of 1951, if the Court please.

Mr. Avakian: It was after the prosecution refused to let us examine the records that we thereafter filed a motion with the Court.

Mr. Campbell: And counsel is referring to the correspondence which is a part of the records of those motions which passed between counsel and

myself and the statements that were made before the Court.

The Court: My recollection is the reason I denied those motions in Las Vegas, they came in a few weeks before the trial, so it would, if granted, have resulted in postponement of the trial and I could not understand why the defense had been so dilatory in waiting for several years before they made the motion to get possession of those records. That was the idea I had.

Mr. Golden: I would say, your Honor, there is some correspondence to disabuse your Honor's mind of dilatoriness. Considerable correspondence passed back and forth and we have been held on a limb, so to speak. There have been promises it would be done.

Mr. Campbell: Your Honor will recall the evidence here. The case was delayed for the period of a year, during which the defense counsel were going to make, and agreed to make, and were apparently to make some kind of net worth statement. At that time the records that were in the office of the Intelligence Unit were made available to their accountant, one Nat Friedman, who spent some period of time, as the record shows, in examining what records were there available. Previous to that time records had been turned over to Mr. Semenza and the evidence shows he was turned loose to take whatever he wanted and selected what records he wanted. Now it seems to me, that those matters having been gone into, it is improper to inject them in this manner with this witness.

Mr. Golden: There is a great deal more to the story than that. Mr. Campbell knows that we were lulled into a sense of security for a long period of time that the year 1944 was not under consideration, that that was sprung on us the last minute and that changed the whole picture. The brief little sketchy statement counsel made just now is very misleading to your Honor. It can't be crossed off that way. I don't want to interrupt Mr. Avakian—

Mr. Avakian: In addition, your Honor, the first time we were refused permission to examine the records was in October, 1951, so there was no occasion prior to that to come to the court. Now what happened was this, and I think your Honor will recall it—we were unable to hire an accountant—

The Court (Interceding): Let us not argue the merits. Read the question.

(Question read.)

The Court: What is the purpose of asking that question at this time from this witness?

Mr. Avakian: For this reason—the witness has testified repeatedly that these records were made available on every request that was made, and it is for the purpose of impeaching that testimony, to show it is not correct and that the fact is that they were not made available upon a certain occasion.

The Court: Objection will be sustained. Call in the jury.

ARGUMENT RE: EXHIBIT "Z" AND
EXHIBITS 109A AND 109B

Friday, February 1, 1952, 1:50 P.M.

(In the absence of the jury.)

Defendant present with counsel.

Mr. Gillen: May it please the Court, in regard to Defendant's Exhibit "Z" for identification, your Honor took occasion to look at this exhibit at the time it was first offered today and I believe from reading over and I believe on the occasion of its original offer some days ago, during the testimony of Mr. Maundrell, around Christmas time, it was also exhibited to your Honor.

Now counsel has offered objection that it is a summary of testimony. I can't follow counsel's objection and counsel's observation in that regard, because this is a document which was prepared and executed between these two principals of the transaction on March 7, 1949, which it becomes obvious at once to your Honor was at a time before anybody testified, before this case even started or this testimony. How could it be a summary? It is not a summary of anybody else's testimony at all. It is the best evidence because it is an agreement stating the facts of the transaction. It is a commitment by both of the parties, both of the principals, to the transaction as to the transaction itself, and it is the then existing status as of the time it was executed.

Now it also serves as admission against interest, despite the fact that gave rise to some mirth on the

part of Mr. Shelton and amusement at the prosecution table. It is in fact an admission against his own interest by Mr. Remmer, in that Mr. Remmer acknowledged by this document that he owes a certain amount of money which, in the false picture that has been attempted to be created here, namely, that there were two payments in 1945 at practically the same time, one for 25 thousand cash, the other 25 thousand by check, would have meant that Mr. Remmer, so far as this transaction was concerned, would have been 25 thousand dollars to the good, but for the fact he admits he is 25 thousand dollars to the bad, that he owes the man 25 thousand dollars more.

Now this document, may it please the Court, is a statement of an account between two principals and it is the best available evidence. It is a recitation of the facts concerning a transaction, it is crystallizing of the status of the transaction and of the obligations involved at the time of the making of the document. It is commitment of both of the principals to those facts as set forth in the document and signed by them. It is better than parol evidence, it is better than oral testimony. It is a prepared agreement and statement of account between two principal participants to a transaction and it is substantiation, of course, of testimony given here, not only by Mr. Schriber, but testimony given here by Mr. Maundrell, whom your Honor will remember, when he moved into the Menlo Club business and was trying to set up a proper and efficient set of books, determined he would rather

have a check out of the checking account represent the initial down payment on the transaction.

Now we feel, may it please the Court, that we have given your Honor a proper and firm foundation on a document that it is elementary would be admissible as the account stated between two principals, substantiating testimony that has already been introduced, not by this defendant, but by the prosecution in this case. Their own witnesses have related this transaction and throughout the case there has been a consistent effort attempted to detract from the very testimony that they have offered before this jury.

The conversations that were had between Mr. Schriber, as he has indicated on the witness stand here, and the man in charge of the investigation, Mr. Weaver, was conversation relating to Mr. Schriber on the income tax status in regard to it, in which he related—and we make this by way of offer of proof—he related the same facts and circumstances concerning the transaction as are revealed in this document and has been testified to both by Mr. Maundrell and Mr. Schriber. We offer the exhibit, your Honor.

Mr. Campbell: I might state, your Honor, that the offer of this type of document in evidence is entirely novel within my experience in the introduction of evidence, and particularly the introduction of evidence in federal court. This document purports to set out certain events which transpired at a time in April, 1945, between April 30th and September 8th, 1945, on its face and is signed,

apparently, by the witness Gene Schriber, who has appeared, and by the defendant, Elmer Remmer, whose signature has been identified. Now, of course, the best evidence of any transaction are the documents which are entered into and oral statements of witnesses who were present at the time of the events. This is a document which was entered into a period in excess of two years after the investigation commenced in this case, purporting to set forth these facts.

Now counsel states that it is an admission against interest on the part of the defendant and therefore admissible in his behalf, which is also a novel situation, so far as my experience is concerned. An opposing party can offer documents which are admissions against interest of a witness or a defendant who is not available to be placed on the stand, and can place into evidence letters or documents written long after the event, as being admissions against interest, but through this method, or after an investigation is started, of a witness and the defendant sitting down and writing up what the facts are and then attempting to introduce that into evidence as being part, at least, the statement of the defendant, without the opportunity of cross-examination, it seems to me is defeating the very purpose of a court proceeding, when the witnesses are put on the stand and the story is elicited from their oral testimony. This is unsworn, it is a document addressed "To Whom It May Concern," written at a time that the investigation was fully under way. Mr. Gillen says it is in substantiation

of the testimony that is already in the record. If that is true, it would add nothing to the record, except it would in this written form and in the manner in which the defendant or his counsel desires, be the evidence which is in evidence. It adds nothing to the record. It is not the best evidence of the events which took place. It purports merely to be a recitation after the events and it does not permit the government to cross-examine one of the parties who purports to state this is what took place.

Under all of the circumstances, the government submits that this document is not admissible under any theory of evidence in behalf of the defendant in this case, and we, therefore, renew our objection to its introduction.

Mr. Gillen: I would like to respond to counsel for a moment.

May it please the Court, here is a thought—I listened carefully to see whether or not Mr. Campbell would make any mention of it. He spoke of admissions against and that admissions against interest can be offered by opposing party in the way of writing or any other admission. Of course, I challenge counsel to say that the defendant cannot offer admissions against his own interests. He certainly can. A defendant can put his head in a noose if he wishes. I also challenge counsel to say that this document which I have offered here would not be an admissible and legitimate bit of evidence against either Mr. Remmer, or against Mr. Schriber, for that matter, if Mr. Schriber was

involved in a trial, if the government sought to offer it, because it would be a statement of transaction between two principals, at least one of which principals are available, and have been available and have been used as a witness by the government. Now there is no question about it, the government at least was furnished a copy of this document more than a year before the commencement of this trial, there is no question about that, the government has had a copy of this for more than a year before this trial started. You said you couldn't find it, but I say that the government has it, whether you have it or not, the government has it, and I will remind you that that was all discussed during the testimony of Mr. Maundrell and you said you would look for it.

I say, may it please the Court, that if Mr. Campbell chose in this case to prove any aspect of the transaction here, to crystallize the evidence on any aspect of the transaction of the purchase of the Menlo Club by Mr. Remmer from Mr. Schriber to produce this document in evidence would be legitimate and admissible, and if the prosecution could put it in, the defendant could. I think counsel's argument went more to the weight than the admissibility. I think it is an admissible bit of evidence, admissible from either side of this case, and we renew our offer.

The Court: In view of the situation we have here, the ruling will stand.

I will hear you on this other matter.

Mr. Gillen: I thought it might be practical to

give your Honor our views before the jury is called in.

The Court: Yes.

Mr. Gillen: With regard to the prosecution's proffered Exhibit 109B, that exhibit, may it please the Court, comprises an execution on judgment executed out of the County Clerk's office in San Francisco, California, and I will remind your Honor that this pertains to that \$1800 judgment against the defendant Remmer on behalf of Ogden F. Monahan, a man who had a judgment for \$1800 back in 1948. That is, he obtained judgment on October 5, 1938, and there was some testimony that shows Mr. Monahan——

Mr. Campbell: I think the evidence shows it was finally satisfied in 1945.

Mr. Gillen: Now there are a number of photostatic sheets which we will pass up to your Honor to examine. The first sheet is writ of execution. We have no objection to the form of the exhibit. We will stipulate it is a true and correct photostatic copy, it has been certified to, of the writ of execution, and we think that is properly admissible as a public record.

Now the other documents which are attached are returns on the garnishment. We have no objection to the form, as being true and correct photostatic copies, certified to, but we do have a serious objection to the documents themselves and to their contents, upon the ground we think they are hearsay. In other words, may it please the Court, when a sheriff takes out a garnishment or writ of execution,

he goes to a bank or he goes to any business establishment, and he makes an inquiry, with which your Honor is well familiar, as to whether or not that particular party holds anything that belongs to, or is indebted to the person named as the defendant. He obtains from the person he inquires an answer yes or no and he simply makes a return, which is hearsay. It is not an official act in and of itself. In other words, the deputy sheriff who serves the document or makes inquiry does not make his own investigation. Under the law he must be satisfied and content with whatever response he gets, whether true or false response, and therefore the contents of the return on the writ is merely hearsay notation by the deputy sheriff that he made inquiry of some one who told him a no or yes answer. He can not vouch for the truth or falsity and therefore the returns are hearsay.

The Court: Your objection goes to the offer of that portion of the exhibit that has to do with these garnishments?

Mr. Gillen: Yes, your Honor.

The Court: As far as the writ is concerned——

Mr. Gillen: The writ itself we believe is admissible.

The Court: Maybe counsel will go along with you on that.

Mr. Thompson: Well, if the Court please, the important part of the exhibit, from our point of view, is the returns on the writ. It is the sheriff's duty, under writ of execution issued by the court to seize any personal property, goods, etc., belong-

ing to the defendant in his hands. That is his statutory duty and his public duty. That is the duty that he presumably carries out and the returns that are part of these writs not only show returns on specific inquiries at certain places, but there is a general return of writ of execution unsatisfied, in which the sheriff certifies that after due search and diligent inquiry he has been unable to locate any property not exempt from execution belonging to the defendant.

Mr. Gillen: That is the part of the writ we are not objecting to.

The Court: Maybe you can get together with counsel. I would like to find out just what part of it you did not object to.

Mr. Gillen: The first two pages we do not object to. The returns we do object to. In other words, here is an example of it in plaintiff's Exhibit 109A. It says a deputy sheriff—

Mr. Campbell: I think we can get together on this. Now is it agreed that with the proffered Exhibits 109A and 109B that, there having been detached therefrom certain documents, that the documents remaining in those exhibits may be admitted in evidence?

Mr. Gillen: The writs and unsatisfied return of part of the writ.

Mr. Campbell: Yes. We will have these stapled together.

The Court: After they are stapled, show them to counsel again so there will be no question about it.

Mr. Campbell: May it be stipulated that 109A and 109B may be admitted in evidence?

Mr. Gillen: So stipulated.

The Court: So we will make the order when the jury returns.

[Title of District Court and Cause.]

ARGUMENT RE: EXHIBIT 183

Monday, February 4, 1952, 1:15 P.M.

(In the Absence of the Jury.)

Defendant present with counsel.

Mr. Avakian: Perhaps it would be well if your Honor had the exhibit before him to follow my grounds of the objection.

The Court: I have it.

Mr. Avakian: We object to the offer of Exhibit 183 for identification, your Honor, on the ground it is incompetent, irrelevant and immaterial. It is based on erroneous conclusions of law and it assumes facts not in evidence and in many instances it assumes facts directly contrary to the evidence presented by the government, and in line with that, your Honor, I would like to, if I may, take up the particular items in the exhibit and point out to your Honor the respects in which they are assumptions of fact not covered by the evidence, or even contrary to the evidence.

First of all, Item No. 2, which is the B. & R. Smoke Shoppe, and your Honor will recall that the figures that are entered thereas to the amount of

the assets of Mr. and Mrs. Remmer in the B. & R. Smoke Shoppe are the figures shown as the total net worth of the B. & R. Smoke Shoppe in one of the other exhibits in evidence here. Now first of all then, the erroneous assumption made here is that the B. & R. Smoke Shoppe is the sole enterprise of Elmer Remmer, whereas the uncontradicted evidence of both of the other two partners, who have been called here by the government, is that the B. & R. Smoke Shoppe was a partnership. Each witness testified to that effect. In other words, with respect to that particular item, the figures that are used as the net worth figures of the B. & R. Smoke Shoppe at the end of each year, are assumptions which are not based on any evidence, because there is no evidence whatsoever of the amount of the assets of the B. & R. Smoke Shoppe on December 31, for any of these years. Mr. Weaver admitted that he had assumed in one case for a period of a year and another case for a period of two years, that there was no change in the bank roll and furthermore, as to one year in which there is evidence, he says the evidence is only five thousand in cash and 15 thousand in markers, rather than the total 20 thousand dollar figure cash used by Mr. Weaver.

The next item, Item 4, which is the Day-Night Cigar Store, again this exhibit assumes that the entire net worth of that enterprise was the net worth of Elmer Remmer, whereas the uncontradicted evidence presented by the government's testi-

mony of the other two partners in that enterprise is that it was a partnership.

The next, your Honor, is Item 5, the 110 Eddy Street, and again this exhibit assumes that the entire net worth of 110 Eddy Street is the net worth of Elmer Remmer, whereas the uncontradicted testimony of the only two witnesses who testified on that point, namely the two partners, Kyne and Cavani, is that that was a partnership.

Then, your Honor, is Item 6, the Menlo Club, where again it is assumed that the entire net worth is entirely the net worth of Elmer Remmer, whereas the uncontradicted testimony of every witness called with respect to the Menlo Club is that it was a partnership.

The next item is No. 7, Transit Smoke Shop, which again assumes that the entire net worth of the Transit Smoke Shop belongs to Elmer Remmer, whereas the uncontradicted testimony of Mr. Kyne is that Mr. Kyne paid up half the investment and there is a check here in evidence, your Honor, issued by the Menlo Club to William Kyne and marked "Loan for Transit," which is in exactly one-half of the amount of the cost of the Transit Smoke Shop and which Mr. Kyne said was used by him to defray his one-half share of the cost of the Transit Smoke Shop.

The next item is No. 8, your Honor, cash on hand, which is shown as December 31, 1946, as \$65,000. There is absolutely no evidence whatsoever in the record that on December 31, 1946, Mr. Remmer had \$65,000 cash on hand. There is in evidence a check

of the Menlo Club issued early in November, 1946, for \$65,000 to William Kyne and marked as a loan to Elmer Remmer and which Mr. Kyne testified that he cashed, put the proceeds in Box 48, which he and Mr. Remmer had access to, and used the money when it became necessary, but there is no evidence whatever of \$65,000, or even any other specific amount, being on hand on December 31, 1946.

Next, your Honor, is Item 11, the Gallagher & Burton whiskey, and as to that there is included in the amount of the net worth shown for that whiskey the sum of approximately \$7400 paid in 1944 as federal excise tax, and in that respect the exhibits makes the erroneous conclusion of law that that \$7400 tax should be treated as an additional cost of the whiskey rather than being treated as a currently deductible item.

Item 12 is designated loan to Brice and Silverman. There is absolutely no evidence in the record that Mr. Remmer ever made any loan to Mr. Brice and Mr. Silverman. There is evidence in the record that Mr. Remmer made an investment in a night club in New York, in which Brice and Silverman were concerned and that that night club went broke within a short time, and within four or five months Mr. Remmer received back \$8,000 of the \$12,000 investment. In connection with that, the significance of the distinction between a loan and an investment is this, that if it was an investment, which was the uncontradicted testimony, and the investment went sour, then if that is a deductible loss because the investment went bad, there is no continuing liability

on the part of anybody to repay him for that, so \$4,000 at the end of 1946 should not be shown as an asset. In other words, if I invest in a business and the business goes broke, the other partners have no obligation to pay me. There is no evidence this was a loan. The uncontradicted evidence is that it was an investment.

Next, your Honor, is Item 23, which lists 29 thousand dollars as due from the Bank Club for Gallagher & Burton whiskey, and the uncontradicted evidence is, your Honor, that this 29 thousand dollars was not paid to Mr. Remmer until July, 1947, and the effect of showing 29 thousand dollars as an asset of December 31, 1946, is to put Mr. Remmer on the accrual basis of accounting, because that is account receivable for merchandise sold and should not be taken into income until paid on the cash basis, and should be included as an asset only on the accrual basis, and there is no evidence here to the effect that Mr. Remmer was on the accrual basis, nor is there any evidence which would justify, as a matter of legal conclusion, that he should be on the accrual basis, and furthermore, I might point out to your Honor, if he were put on the accrual basis, then to be consistent, the entire net worth statement would have to be on the accrual basis and as to every figure here would be subject to revision.

Next, your Honor, with respect to the liabilities. There is no liability shown with respect to the sum of 50 thousand dollars borrowed from Robert Jeffress on September 27, 1946. The omission of that

50 thousand dollars liability would inflate the net worth as shown in this exhibit by the same amount. Now the uncontradicted evidence is that 50 thousand dollars was borrowed from Mr. Jeffress on September 27, 1946. The uncontradicted evidence is that immediately thereafter, I believe on the next day, Mr. Remmer put 50 thousand dollars into Cal-Neva account, as the books of Cal-Neva show, and that that payment to Cal-Neva is taken into account here in computing his obligations to Cal-Neva, so the omission of the loan from which the payment to Cal-Neva was made would inflate his net worth by 50 thousand dollars, and I point out to your Honor that the uncontradicted evidence also is that in July of 1947, out of this 29 thousand dollar check from the Bank Club, Mr. Remmer paid 23 thousand to the Bank Club at that time on account of Mr. Jeffress' obligation to the Bank Club, so that it appears quite evident from the evidence so far that at least as to 23 thousand dollars of the 50 thousand dollars borrowed from Mr. Jeffress, the obligation was still in existence at the end of 1946.

The sum and substance of what I just said, your Honor, is that Exhibit 183 for identification, instead of correctly showing the difference between Mr. Remmer's total assets and total liabilities, in arriving at the proper net worth, rather miss at least one liability and on the asset side makes assumptions detrimental to him which not only are not covered by the evidence, but in some instances are contrary to the uncontradicted evidence submitted by the government.

Now, in that connection I would like to call your Honor's attention to the case of Kirsch vs. United States, decided in 1949 by the 8th Circuit Court of Appeals and reported at 174 Fed. (2d), beginning at page 595. In that case, your Honor, the defendant was charged with income tax evasion and the government's case was based on what is commonly referred to as the bank deposit theory, which treats deposits in a bank as gross income to the extent that they are not identified as being something else, and the senior revenue agent testifying in that case was asked to compute the tax due by the defendant on the basis of a hypothetical question, which assumed that the unidentified deposits in his bank accounts were income. On an objection to that question in the trial court that it assumed facts not in evidence, the trial court suggested that the question be amended so as to state specifically that it was being assumed that the unidentified bank deposits were income, and on the basis of that amendment the court overruled the objection, saying: "I think the jury understands that what counsel is asking here, he is putting in these unidentified deposits as being income. Now he is assuming this is income, and he is giving his answer on that assumption, so that if you find it is not income and the amount is not the same on those unidentified deposits then, of course, this computation wouldn't be correct and you should not consider it," and the question was answered and after conviction, the Circuit Court of Appeals reversed the conviction, holding that it was improper to put a hypothetical question

to the revenue agent based on assumptions of fact which were not covered by the evidence and which were, in fact, contrary to the evidence, and in that respect the evidence in the case showed, your Honor, from the testimony of the revenue agents, as follows: (Reads from 174 Fed. (2d) "At the trial * * * of the fact assumed." (Page 599-601.)

Now, your Honor, the assumptions that have been made here in preparing Exhibit 183 for identification, which run afoul of that rule—

The Court: I would like to have that before me.

Mr. Avakian: Yes, I am going to hand it to you. The assumptions that are going to violate that rule I will not enumerate in detail, and call attention to just two categories—one is the assumption in the face of uncontradicted evidence of the government's witness that none of these enterprises was a partnership; secondly, in another category is the presumption of the 50 thousand dollars that Mr. Remmer put into Cal-Neva in September, 1946, as in effect an asset, that is reducing the amount that he owed Cal-Neva, treating that in effect as increase in net worth and excluding, your Honor, the question of liability to Jeffress for 50 thousand dollars, which was incurred at or about the same time. I might call again your Honor's attention to this language here in the Kirsch case, in which they say it is wrong for the agent to do this, it is wrong for the agent to say: "From the evidence it shows all these deposits were not income, but I did not know how much was and I have made no effort to find out."

Certainly then it is improper to ignore the borrowing from Mr. Jeffress.

The Court: There was complete absence of any evidence that certain items of the bank account were income in that case.

Mr. Avakian: The evidence showed certain items were income, as to others, they didn't know.

The Court: There was a complete lack of evidence as to those.

Mr. Avakian: That is right, your Honor. Now the significance here of ignoring the partnership is that all of the assets of these partnerships, even though on the books of the companies that are in evidence here, even though capital accounts of different partners have been built up, even though that represents the portion of the assets there in which the partners have an equity, that is all ignored, your Honor, although that is the uncontradicted evidence and the sum total of the assets of those businesses is treated as Mr. Remmer's net worth. Now if there were testimony here, your Honor, to the effect that these were not partnerships, if partners came in, for example, and said, "I was described as a partner, but I wasn't a partner," or if the evidence were that the partner said, "Although a certain amount was credited on the books to my capital account, it was never intended that I should have that equity," then it would be a different matter, but the uncontradicted evidence of every witness, your Honor, shows that these were partners, every witness called here said, "Yes, I was taken in as a partner, my share of profits was

credited to me on the books to build up my capital investment in the place." Now we can't ignore that.

Now, I would like to hand this decision up to your Honor. The portions from which I read commence at page 599. The decision itself commences at page 595; page 599 to 601, inclusive, I believe are the pertinent portions, your Honor.

The Court: I can't think of any questions at this time.

Mr. Campbell: I would first like to point out that the Kirsch case has no application to our present problem in this case. As I recall, the Kirsch case was one on which the government predicated the unreported income on what is known as the bank deposit method, as contrasted to the net worth method, which is the government's contention in this case. Under the bank deposit method, so-called, the government attempts to prove, through large bank deposits which continue over the period in question and which are in such amounts as to appear to be income, being received in the course of business, that a proper inference can be raised that those bank deposits are taxable income; and in the Kirsch case, as I recall, that was not supported, for example, by increases in the defendant's net worth, and I do not believe any attempt was made to show other than in general terms, the source of the money nor for what it was spent after it had come into the hands of the defendant, and in that case the government agent ignored the Blackman case—and the court does distinguish it from the

Blackman case, which was also a bank deposit case—the agent stated that the amount of bank deposits might very well include items which were re-deposits and therefore not income, but that in the absence of anything to the contrary, we are assuming, and have assumed, that they were income. In the Blackman case, which is the leading case on bank deposit slips, the agent testified he had, to the best of his ability, eliminated all duplications from re-deposits of funds. In other words, the bank deposit method, of course, is essentially a somewhat unsatisfactory method because a man's bank account does not necessarily reflect income producing activities. In other words, a man in business, such as a merchant, may cash checks for his customers, or may accept checks which are in part payment for goods and deliver the balance in cash to his customer, so that his deposits do not necessarily indicate his receipts for a given date, and that is the same type of thing which the agent in the Kirsch case admitted he had not eliminated.

Here, however, we are dealing, not with attempt to prove income through daily or weekly deposits to a bank account, but we are relying upon the increase of assets belonging to the defendant and which method, of course, has on various occasions and at various times in various cases been approved by this circuit. A recent case in this circuit is that of *Barcott vs. United States*, reported at 169 Fed. (2d), 929, in which the decision written by Judge Orr, the other two members of the bench concurring in the decision being Judge Stevens and Judge

McCormick, who recently retired as senior district judge at Las Vegas. Reading from page 930: (Reads) "Agent Swan made a computation——"

The Court: I think part of this argument is addressed to this contention that there is no evidence showing that certain of these enterprises are not partnerships. It would appear to me at this state that would probably be the most serious of the questions raised.

Mr. Avakian: Also the 65 thousand dollar amount on hand and the excluding of the Jeffress liability of 50 thousand dollars.

Mr. Campbell: I will refer to the two individual items first and then to the partnership allegation.

As to the liability of 50 thousand dollars to Jeffress, the defense in cross-examination of Mr. Maundrell, introduced a note bearing date, I believe, September, 1946, or some such date, in amount of 50 thousand dollars which, as I say, was produced by the defense. Mr. Maundrell testified that he was present when Jeffress, who is now deceased, came into the office with a large number of bills wrapped up in a newspaper, that Remmer called him in and told him to write up some kind of note and receipt for the 50 thousand dollars, and he wrote up that note. He testified he had no knowledge of the transaction other than that on direct examination, that so far as he knew, the note could have been paid back the next day. He had no knowledge when it was paid back or how long it was outstanding, so there is no evidence in the

record that there was an outstanding liability of 50 thousand dollars at the end of 1946.

Now counsel refers to certain evidence given here by Mr. Perkins, the accountant for the Bank Club, that when they got to the point of paying some 29 thousand dollars they owed Mr. Remmer on account of whiskey in 1946, that at Mr. Remmer's direction when they repaid this in 1947 that they applied some 23 thousand dollars, or very similar sum, to an obligation which Jeffress owed to the Bank Club. That was all there was of that testimony. Now how Mr. Avakian can draw from that—of course, he is entitled to any inference he desires to draw—but how he can properly draw from that the fact that was a repayment of this 50 thousand dollar loan, wasn't another loan or wasn't a repayment on some loan that was made subsequently, I don't know. All Mr. Perkins knew, and all he testified to, was in June or July of 1947 Mr. Remmer permitted the application of some funds owed to him to be applied to the obligation of Jeffress, and I submit that this is not sufficient proof that there was an outstanding obligation or liability as between Mr. Remmer and Mr. Jeffress as of December 31, 1946. It may be there is evidence available to the defense to prove that as the evidence now shows, the government is certainly entitled to draw the inference it has. I might say in that regard there was testimony from Mr. Weaver—he was asked if during the course of his investigation he had gone into this loan between Jeffress and Remmer, for the purpose of ascertain-

ing whether or not it was outstanding as of December 31, 1946, and he was asked specifically and called for certain exhibits as to when, during the course of his examination he had gone into that matter, and referred, I believe, to some letter which he had received from Semenza regarding credits to Mr. Remmer's account, that is, to Mr. Remmer's account in the books of Cal-Neva, Inc. As I recall Mr. Semenza's testimony, he stated he was unable to ascertain there was any such outstanding liability.

Mr. Avakian: That is not true.

Mr. Campbell: The record will speak in that regard. As to the 65 thousand dollar item, there is in evidence check for 65 thousand dollars which Mr. Kyne stated he cashed, that he wrote at Mr. Remmer's request, cashed the check and received 65 thousand dollars cash and turned that cash over to Mr. Remmer, as I recall, in November, 1946. At any rate, the check is here and bears a date; that that money had never, to his knowledge, been returned. Under the circumstances, we have charged that 65 thousand dollars as being on hand as of December 31, 1946.

Now with relation to these partnerships to which reference has been made. Counsel states the record is entirely lacking in any evidence which would substantiate the government's placing of these assets, or of the net worths of these businesses, in the asset side of Mr. Remmer's statement. Now the evidence here shows that the entire investment in each of these enterprises, with the exception of

the 186 Club, where some 16 thousand dollars was put up by Kopstake and Nealis and subsequently returned to them from earnings of the corporation, and with the exception of certain money in 110 Eddy Street, which was put up by Mr. Pratt, but which was returned to him, that all of the monies and funds were put up by Mr. Remmer.

The evidence further shows that the agreements as between Mr. Remmer and these other people, if they be considered as bona fide agreements, provided that Mr. Remmer was to receive the return of his investments before these other people were to receive anything. Mr. Kyne repeatedly was returned to the witness stand, he stated these were working agreements, he stated that the agreements of the Menlo Club were the same in connection with all the organizations. It is true the Menlo Club agreements were entered into after the origination of this investigation, but I think of considerable significance is the fact that you have these various groups, with supposedly different partners, yet the money was transferred back and forth without reference. Partners on the books were eliminated and new ones brought in apparently and showing on the books of the percentages to which the partners were allegedly interested, without consultation of the partners. The one man who was produced here who made an investment in the 110 Eddy Street, Mr. Pratt, did not know who his partners were, if any, and couldn't find out what the profits of the concern were, if any.

So far as the B. & R. Smoke Shoppe, the Day-

Night Cigar Store, the Menlo Club, Transit Smoke Shop, these were all enterprises in which all of the cash involved was put up by this defendant. They were his capital. So far as the record is concerned, he was entitled to get back everything he had put in—and I think this is for the jury to determine—the government has produced here everybody who purported to have any interest in these matters.

As to the loan to Brice and Silverman, examination of the documents themselves will show that it was a loan. It was the testimony of Mr. Maundrell that it was a loan. It was the testimony of Mr. Maundrell on cross-examination that Brice had informed him that that portion which the government is now allowing as a repayment, had been repaid to Mr. Remmer.

Now as to the Gallagher and Burton whiskey, counsel raised the question of including the obligation from the Bank Club to Mr. Remmer for the purchase of that whiskey. Well, I presume it could be put either way, either he has the whiskey on hand or he has an obligation for the whiskey. The amount of money would be the same, whether you put it as whiskey on hand or whiskey for which he is to received money, which has been acknowledged by the Bank Club as outstanding and owing to Mr. Remmer as of December 31, 1946. When a man sells an asset, which this whiskey was, to a concern who are to pay him subsequently for it, he does not take a loss, to carry out Mr. Avakian's argument, to the amount of his investment in the asset; in other words, he had 29 or 30 thousand

dollars' worth of whiskey—he cannot take a 30 thousand dollar loss of income for that period except he sold it, as Mr. Avakian's theory would result. In computing income on a net worth basis, however, accounts receivable are properly included as a part of the net worth, and that is so particularly where the assets giving rise to the account receivable have been removed as an asset from the net worth statement, as is the situation here.

Now as I understand the decisions with relation to the net worth method and with relation to the computations and with relation to the preparation of charts, either side is entitled, if the evidence will support it, or the inference from the evidence which can be reasonably drawn on the theory of the party presenting the particular chart, is entitled to place such theory before the jury, and I refer specifically to the case of *U. S. vs. Skink*, 126 Fed. (2d), 702, where a similar method as that which is here adopted by the government is used. Now this chart which is offered here is based entirely upon evidence which has been produced in this case. Now I agree that counsel does now, and has throughout the case, and will continue undoubtedly to quarrel with much of that evidence and to quarrel with the inferences which the government would draw from that evidence, which, of course, is perfectly proper for them to do so. That is one of their functions in the case, but I submit that this particular exhibit seeks to draw, if it draws any inference, draws inferences which can be legitimately drawn from the evidence and which the jury can have the right

to draw from the evidence. Counsel's statement here is argument which might properly be presented to the jury in his argument of the case, of the strength and value which should be given to this proposed Exhibit 183. However, I do not believe that that affects the question of the admissibility of the document, for such weight as the jury might finally determine to give it under the legal instructions of the Court.

There is one other case also on the matter of recomputation by treasury agents of assets and liabilities and resulting net worth of a taxpayer. I refer to a case decided May 28, 1951, by the 6th Circuit, *Garivy vs. U. S.*, 189 Fed. (2d), 459.

Mr. Avakian: If I may first comment briefly on these authorities which Mr. Campbell has cited and then on certain factual statements he made.

The *Garivy* case which he just cited deals only with the proposition it is proper for expert witnesses to present for use of net income and tax resulting therefrom the net worth method and we have no quarrel, your Honor, with the propriety of using expert witnesses to make these computations. That is not the point of our objection at all. The point of our objection is that this must be based on evidence in the record. Now the *Garivy* case did not involve that question. The *Barcott* case is simply a case concerning net worth method, was properly applied in that case and does not deal with the question of the meaning or scope of a hypothetical question to an expert witness, so it likewise has no bearing on the point here. It has

been some time since I have read the Skink case, but my recollection is it likewise does not involve the rule the hypothetical question to an expert must be based on evidence supported by the record.

Mr. Campbell: Pardon me—I did not understand the hypothetical question is presently before the Court.

Mr. Avakian: Oh, yes, it is, your Honor, because incumbent in the exhibit if the computation of net worth on the basis of the evidence that is summarized in the exhibit. Instead of the witness saying verbally what the evidence is, he has it set forth in writing.

The Court: Let me ask you this question: Couldn't a computation be based upon the evidence and also upon a reasonable inference which might be drawn from the evidence?

Mr. Avakian: That is right, your Honor. The hypothetical question may include any inference which the jury could properly draw from the evidence that is in the record. That is where we come exactly to the Kirsch case. In the Kirsch case, your Honor will recall, there was a fixed—

The Court (Interceding): Yes, and I take it in that Kirsch case there was no evidence at all—(reads from the Kirsch case). Because it is found some of the deposits unaccounted for by any evidence on that point.

Mr. Avakian: That brings us specifically to the 65 thousand dollar cash on hand and I point to the inconsistency in Mr. Campbell's argument between that point and the Jeffress loan. He says the

Jeffress loan was negotiated September 27, 1946. There is no evidence, other than Mr. Perkins' statement of 23 thousand dollar payment by Remmer to Jeffres' account the following year, that that liability still existed at the end of 1946, but on the 65 thousand dollars that Mr. Kyne says he turned over to Mr. Remmer on November 7, 1946, there is no evidence whatsoever that that money was on hand on December 31st. Mr. Campbell did not point to any evidence. On the contrary, he said, "Under the circumstances, we are entitled to assume that that money was still on hand." On the contrary, your Honor, Mr. Kyne's testimony is that Box 48 was continuously being used to put money in, take money out, and there is no record what was there at any particular time. He put the 65 thousand dollars there on November 7, 1946, but there is no evidence, your Honor, as to whether that, or any portion of it, or even a penny of it, was there on December 31st. The record is silent. We meet exactly the point of the Kirsch case. An assumption is being made without evidence to support it.

Mr. Campbell says, with respect to the Gallagher and Burton whiskey, it doesn't matter whether we ignore the whiskey or the amount payable on it. It does matter, your Honor, because the whiskey was entered at cost of 29 thousand dollars, as shown here by the proposed Exhibit 183 at the end of 1945. If you eliminate the whiskey from the assets and put it in account receivable, you are in effect charging him with having receivable, you are in

effect charging him with having received 29 thousand taxable income in 1946, when actually he did not get the money until 1947. That is why I say the assumption he makes here puts it on the accrual basis.

Then, your Honor, with respect to these partnerships. Mr. Campbell overlooks the fact that, using Mr. Maundrell and the Menlo Club as an example, there was a credit on the Menlo Club books to Mr. Maundrell's account at the end of 1946 in amount of \$17,000. Mr. Maundrell, during the next thirteen months, withdrew \$15,000 of that \$17,000. In the exhibit here, your Honor, that portion of the assets, namely, that \$17,000 credited to Maundrell on the books of the Menlo Club, is treated as Mr. Remmer's asset. The evidence shows within thirteen months Mr. Maundrell put \$15,000 in his own pocket or used for his own purposes and yet this exhibit, in the face of that, your Honor, in the face of that treats that \$17,000 as part of Mr. Remmer's net worth. Now it is credited on the books to Maundrell's account, it is his portion, his equity in the assets of the Menlo Club. He actually draws it out within thirteen months; over a period of thirteen months in periodical withdrawals, he withdraws it, your Honor. Now does the evidence here support the inference that that \$17,000 credited on Mr. Maundrell's account is entirely Mr. Remmer's assets? It does not, your Honor. There is no reasonable inference can be drawn. These are all facts brought into this case by the prosecution's witness. It would be different if Mr. Maundrell said "none

of that \$17,000 was credited on the books to my account, it did not belong to me and I never exercised a claim over it and I walked out and ignored it and left it there." That would be different, but Mr. Maundrell took \$15,000 of it within the next thirteen months and you can't draw inferences contrary to that, your Honor. That is the prosecution's witness testifying. That is the uncontradicted testimony; that is what every witness says, and you can't draw an inference contrary to the prosecution's uncontradicted testimony. If the evidence were questionable, yes, but where the evidence is direct and positive and it is uncontradicted, you can't draw inferences contrary to it. That is the point of the Kirsch case. Undoubtedly in the Kirsch case the government argued to the jury that they should infer that all of these bank deposits represent income and undoubtedly the jury did infer or they wouldn't have convicted him, but the Circuit Court says no, that was improper, there was no basis for inferring from the evidence in that case that all the deposits were income, and similarly, as to each of these various items, we submit that the uncontradicted evidence is in such a state that on many of these items it is not permissible to draw any inference contrary to the direct testimony of the witnesses.

Now, your Honor, if we are right in any major respect, you can see the prejudice of submitting to the jury and allowing the jury to see his net worth statement, which on the basis of various assumptions made, which we feel are contrary to the evi-

dence, builds up a net worth at the end of 1946 of 482 thousand dollars. Now that is not correct, your Honor. There are some items there that are correct, but there are many on which no proper inference from the evidence could support the inclusion.

Mr. Campbell: We will submit it, your Honor.

The Court: Mr. Campbell, on this \$17,000 received by Mr. Maundrell, what is your position in regard to that?

Mr. Campbell: Well, simply this, your Honor; I do not think the evidence in the case shows he received \$17,000.

Mr. Avakian: Fifteen thousand.

Mr. Campbell: Certain taxes were paid for that and he received a certain amount of cash. Now as I see the situation, we have to take that which existed as of December, 1946. Now there was in existence an agreement about that time between Mr. Maundrell and Mr. Remmer, by which Mr. Remmer was to receive a return of his 175 thousand dollar investment before these other people were to receive anything. Now we do know that the books of the Menlo Club were entirely inadequate for the period which we have under consideration here. For example, the bank account was left entirely off the records, funds were transferred back and forth from Mr. Maundrell and whatever funds were needed for another enterprise, they would come out of the safety deposit box or out of the Menlo funds. It may very well have been, we don't know—but in a period subsequent to this

Mr. Remmer did get his entire 175 thousand dollars back, which would entitle Mr. Maundrell to what funds he received some 13 months later. However, for the purpose of this case and for the purpose of determining the relationship of assets as of December 31, 1946, I think we have to look to the situation as it existed at that time—what the circumstances were, what the impelling factors were of Mr. Maundrell receiving this money, were there legitimate partners who had dropped out of the thing long before—Mr. Fricker and Mr. Ditto received nothing as far as the evidence shows. Whether their account was still being carried on the books, I don't know, but I do believe that we have to look at the situation as it existed at the end of 1946. The evidence would show that Mr. Maundrell apparently was the only one—I believe that there are some small payment shown in the records to Nelson.

Mr. Avakian: Not so small.

Mr. Campbell: Well, the record shows that. I think the government is entitled to draw its inference from the records and from the exhibits which are here. So far as this witness drawing any inference, he has, according to his testimony and examination of the records here will disclose, placed on here the figures which are disclosed in the exhibits to which reference has been made and which are here in evidence. That is the government's position.

The Court: Well, the exhibit will be admitted in evidence.

3:50 P.M.

(Defendant present with counsel.)

Mr. Avakian: Your Honor, the testimony of Mr. Maundrell which I have in mind is at pages 1401 to 1404 from the transcript, and I read particularly these questions and answers on cross-examination:

"Q. Now, Mr. Maundrell, you were questioned concerning two checks that were issued by you in November of 1945—November 16th, I believe was the date—for six thousand dollars to Lou Brice and Mattie Silverman. Those two checks, totalling 12 thousand dollars, represented a 12 thousand dollar investment that Mr. Remmer made in a night club in New York with Mr. Brice and Mr. Silverman, is that correct? A. Yes, sir.

"Q. And that night club failed, did it not?

"A. Yes, sir.

"Q. In how short a time?

"A. About 8 days.

"Q. It operated about 8 days and failed?

"A. Yes, sir."

And then there is subsequent testimony, as to which, I think there is no dispute, that four or five months later Mr. Remmer told Mr. Maundrell that at some time prior to that conversation he had gotten back eight thousand dollars out of that twelve thousand.

Now, your Honor, we feel this question is proper. There is also testimony of Mr. Kyne, which your Honor can recall, where he talked to Mr. Remmer on the long distance telephone, Mr. Kyne being in

New York, and Mr. Remmer told him he had a piece of a New York night club. In any event, your Honor, the purpose of the question is this. One possible interpretation of the evidence, according to this testimony of Mr. Maundrell I have just read——

The Court: Pardon me—does Mr. Campbell dispute that?

Mr. Campbell: Yes, to this extent, your Honor. I have before me, for example, check 1538, which is Exhibit 133, in regard to this check to Lou Brice for six thousand dollars. I also have before me government's Exhibit 133, which is the check stub book and which is marked "Loan." I have in mind the fact that on direct examination Mr. Maundrell testified as both the six thousand paid to Brice and the six thousand paid to Silverman, both were loans in connection with that and the question on cross-examination——

The Court: Let us find out what he said on direct examination.

Mr. Campbell: Yes. Might I borrow your transcript?

Mr. Avakian: Surely. Your Honor, as long as there is evidence which supports the facts in my question——

The Court (Interceding): If there is evidence on this direct examination that this was a loan, then in response to a question on cross-examination about an investment, I don't know that an inference should be drawn what he calls a loan should be changed to investment.

Mr. Avakian: It can be interpreted either way in this case. If it is subject to two interpretations, we are entitled to question on both of them.

The Court: Did Mr. Maundrell use the word "investment"? Let us see what he said on direct.

Mr. Avakian: Your Honor will also recall Mr. Kyne said he had a piece of a night club, that also has a bearing on it. That was on direct, your Honor.

Mr. Campbell: Here is his testimony on direct examination, page 1219:

"I show you plaintiff's Exhibit 133G, Check No. 1538, dated November 16, 1945, payable to Lou Brice, in amount of \$6,000, and ask you for what purpose that check was drawn?

"A. Well, that was given to Mr. Brice as payment on night club Mr. Remmer had an interest in in New York.

"Q. What was the source of the funds on which you drew this check?

"A. The money was given to me in cash by either Mr. Remmer or the manager of the Menlo Club. If Mr. Remmer wasn't around, I always got the money from the manager."

I think from the record either inference could be drawn.

The Court: The objection will be overruled.

Mr. Campbell: I will withdraw my objection.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the trial commencing November 28, 1952, and that the foregoing pages, comprising 101 in number, are a true and correct transcript of my said shorthand notes of the arguments held in the absence of the jury during the trial on January 28, 29, 30, 31 and February 1 and 4, 1952, to the best of my knowledge and ability.

Dated at Carson City, Nevada, February 19, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed February 19, 1952.

[Title of District Court and Cause.]

JURY TRIAL

Be It Remembered, That the above-entitled matter came on regularly for trial before the Court sitting with a jury at Carson City, Nevada, on Wednesday, the 28th of November, 1951, the defendant being present in court with his counsel.

Appearances:

MILES N. PIKE, ESQ.,
BRUCE R. THOMPSON, ESQ.,
JAMES H. SHELTON, ESQ.,

Attorneys for Plaintiff.

JOHN R. GOLDEN, ESQ.,
LESLIE C. GILLEN, ESQ.,
SPURGEON AVAKIAN, ESQ.,
LOHSE & FRY, By
GEORGE LOHSE, ESQ.,

Attorneys for Defendant.

Opening Statement

By Mr. Pike:

May it please the Court, ladies and gentlemen of the jury: This morning I made a brief statement of what the case was about to this extent, that I endeavored to outline the elements contained in the six different counts or charges of the indictment. Now, as you have been told by the Court, the in-

dictment itself is no evidence whatsoever of guilt. It is the mere formal charge against the defendant in this case. It is, however, as the Court has indicated, the mechanism through which and upon which the evidence brought before the jury for its consideration must be predicated. What I had to say this morning was, of course, not evidence in the case, and what I have to say now in connection with this opening statement, or what I say or any other attorney in this case may say throughout this trial is not in any sense evidence. If I make errors in referring to the figures contained in these charges, I have no doubt that I will be promptly corrected. However, I assure you that, to the best of my ability, the correct figures will be presented for your consideration at all times.

The jury has listened to the reading of the indictment and each of the six counts contained in it and each juror is, of course, aware at this time that the six charges, and each of them, charge the defendant, Elmer F. Remmer, with the violation of a certain federal statute, which makes it an offense for a person to wilfully attempt to avoid and defeat the payment of a tax due the United States. In this case, of course, the particular tax that is referred to is the federal income tax and the particular years that are referred to in the indictment are the calendar years 1944, 1945, and 1946. There are two counts in the indictment as to each of those three years, '44, '45, and '46, and, for example, with reference to the first year in which the violation is charged, the calendar year 1944, we find the charge

there to be that the defendant, Elmer Remmer, with intent to violate the law in attempting to defeat and evade a large part of the tax due the United States for income, did file a false and fraudulent income tax return for himself, in which he falsely stated the amount of taxable income that he had received for that taxable year and the amount of tax due, and the indictment then goes on, in that count, to state the government's contention and what it will be obliged to prove as to the actual taxable income that he received for the calendar year 1944 and the correct amount of tax that was due and payable on the actual taxable income received by the defendant for that year.

Now in the second count of the indictment we see the name of Helen L. Remmer appearing for the first time. Now, as the jury knows, Helen L. Remmer is not a defendant in this case and there is no other defendant in this case besides Elmer F. Remmer, but in the second count of the indictment the charge is that for the calendar year, 1944, Elmer Remmer, the defendant, wilfully and knowingly, and for the purpose of evading the payment of this tax due, or a large part of the tax due, filed, or caused to be filed for Helen L. Remmer a false and fraudulent income tax return, in which the amount of taxable income received by Helen L. Remmer for the calendar year 1944 was falsely stated and the amount of tax due on the taxable income received by Mrs. Remmer for that year was falsely stated. The indictment then goes on to charge the government's contention as to the correct

taxable income for Mrs. Remmer for the calendar year 1944, and also to state in the indictment the amount of tax that was due for that year. Thus we have for the calendar year 1944, Elmer Remmer filing his own false income tax return, according to the charge, and in the second count of the indictment that Elmer F. Remmer filed, or caused to be filed a false and fraudulent income tax return for his wife, Helen L. Remmer for that same year.

I say that by way of illustration because if we move on then to the calendar year 1945, we find a similar situation. We find in the third count of the indictment that Elmer Remmer is charged again, for the purpose already stated, the charge that he unlawfully, in the indictment, filed a false return for himself in that calendar year, and we find in the next succeeding count of the indictment, Count 4, that he is charged with having filed, or caused to have been filed, a false and fraudulent return for the taxable income received by his wife, Helen L. Remmer for 1945; and just so, when we come to the fifth and sixth counts of the indictment, we note that they relate to the calendar year 1946 and we find in the fifth count of the indictment the charge that Elmer Remmer, for the purpose stated in each of the counts, did wilfully attempt to evade the payment of the correct income tax due from him for his taxable income for the calendar year 1946, filed a false and fraudulent return. The indictment in that particular Count 5, charges the amount of income that he reported and the amount of tax upon that income and then it charges what, under the

government's contention, he should have reported in order to comply with the law and the amount of tax that was payable on that correct and larger amount of income.

Count six and last count of the indictment follows the same pattern. It is for the calendar year 1946, just the same as the fifth count. The charge is, without elaborating again, that the defendant, Elmer Remmer, filed, or caused to be filed, a false and fraudulent return of income for the calendar year on behalf of Helen L. Remmer. The indictment then sets out the amount that was reported, which it charges was a false amount, it was known to be false to Elmer Remmer at the time he reported it. He did it wilfully, in an attempt to evade payment of income tax due on that and sets out the amount of tax computed on the amount of income reported by the defendant in the false and fraudulent return filed for Helen L. Remmer for the calendar year of 1946 and also the government charges, in the concluding language of that count, the correct amount of tax that should have been paid.

The jury has been impressed by the language "wilfully and knowingly," as it appears in the federal statute, that makes it an offense for a person to attempt to evade the payment of a tax due, and the indictment contains the same language. The defendant is charged with having wilfully and knowingly attempted to defeat and evade a large part of the tax due in each one of these counts. That is true in every count, and "wilfully and knowingly,"

of course, means just what is says. It means that the government must establish——

Mr. Gillen: Your Honor, I must offer an objection that counsel is now departing from the prerogative of——

The Court (Interceding): I think counsel is just about to tell the jury that the government must prove the intent.

Mr. Pike: That is right.

Mr. Gillen: He is interpreting words, which is your Honor's province and must come from your Honor as a matter of law.

Mr. Pike: It is an element of the offense and that is what I am trying to say within my ability—that the government is obliged to prove knowledge on the part of the defendant that the amount of taxable income reported in the particular income tax return filed for each of these years, 1944, 1945, and 1946, was not the correct income for that particular calendar year. The government is obliged to prove that, which is the intent element in this case, beyond a reasonable doubt.

Now there will be rather voluminous records offered in evidence by the government and many records may be received in evidence. Those records will be produced before the jury by people who will bring them into court and standing alone, the jury may wish to know the significance of any particular documents or records that are brought before the Court and the jury for consideration. It is in connection with this evidence, when received and admitted in evidence, and the other accepted evidence

in the case on the part of the government, that I address these brief remarks, as possible assistance to the jury in following the evidence which will be submitted.

In connection with the government's case evidence will be brought forward to show taxable income in the amount charged by the government in each of these calendar years, both as to the counts referring to the income of Elmer F. Remmer and the counts referring to Mrs. Remmer, or as she is named, Helen L. Remmer, for the purposes of this trial, for the particular calendar years, and there will be brought before the jury evidence as to the method of the determination of that amount of income for each of those years, as referred to in each of the six counts of the indictment.

The evidence will follow what may be referred to as a net worth computation of income. Now there it is the position of the government that net worth of a taxpayer may be considered generally as the difference between his assets and his liabilities, or perhaps, in more of our usual way of talking, the difference between what he owns and what his obligations and debts are, constitute a person's net worth. So here the government, in presenting its evidence as to the income that is charged by the government to be taxable under each of these counts of the indictment for each calendar, will present evidence showing what the net worth of the taxpayer was at the beginning of the calendar year and will further offer evidence to show what the net

worth of the taxpayer was at the end of the particular calendar year.

Now by way of pointing out this evidence, let us say that this evidence will show that the sources of property are confined within general classes through necessity, and those classes are gifts, inheritance, borrowed money, net income, whether that income be profits or whether it be earned income, and the evidence will consider and be presented to you on the proposition of the elimination or the consideration of the elements of gifts or inheritance having been received by the taxpayer during any given calendar year, after the net worth of that taxpayer has been established as of the beginning of that particular calendar year.

Now by way of pointing out as a further simple illustration on that, let us assume that if there were ten thousand dollars net worth of the taxpayer at the beginning of the particular calendar year, and eliminating gifts, inheritance and borrowed money, and the net worth of the taxpayer at the end of that particular calendar year is twenty thousand dollars, then there would appear to be a gain through income of ten thousand dollars at least, and why ~~did~~ I say at least? Because if the taxpayer has a gain of ten thousand dollars at the end of the calendar year in his net worth, the taxpayer has had his living expenses in addition to that, and it is generally on this net worth method of computation that the government's evidence in this case will proceed. The evidence will come forward before you on the proposition too that when

it comes to the value of assets and liabilities, that the cost and not the marketable value will be relied upon by the government to establish the correct taxable income as charged by the government.

Now you have heard other language here in each count of the indictment as follows, and I read from Count 1, about the middle of the count, where it says:

“Elmer F. Remmer in the year 1944, * * * filed and caused to be filed with the Collector of Internal Revenue for the Internal Revenue Department for the District of Nevada; Reno, Nevada, a false and fraudulent income tax return, wherein he stated that his net income for the said calendar year, computed * * *”

This is the language particularly:

“* * * computed on community property basis was * * *”

according to the government's charge, a false and fraudulent return and smaller figure than he actually had in the way of income. But referring again: “Computed on community property basis”—I do not wish to discuss law, but under appropriate instructions of the Court you will be advised as to that aspect of the language of the indictment, which appears in every count, and you will note in that connection, of course, that each time there has been in the first count a reported income of Elmer F. Remmer, in the second count the reported income of Helen L. Remmer, the third count the reported income of Elmer F. Remmer, the fourth count the

reported income of Helen Remmer, the fifth count the reported income of Elmer Remmer, the sixth count the reported income of Helen Remmer, and relating to the right of a taxpayer in a community property State, which Nevada is, to divide their community property income for the purposes of the income tax law, so as to properly take advantage of the particular tax advantages that might be available to them through so dividing their income in their income tax returns.

So I would say this, that as to the charge here, we find that Elmer Remmer is charged in each count with the intent, or in the language here, "willfully and knowingly" having filed these false and fraudulent returns, in an attempt to evade payment of a large part of the income tax due for the particular calendar year, and I have stated that the evidence to be brought forward by the government will follow the net worth computation basis and there will be certain evidence as to the assets of Mr. Remmer as at the beginning of each of these three particular calendar years, '44, '45, and '46. What he owned at that time was what we will say his assets were at that time, and what he owed at that time was what his liabilities were at that time and the amount by which his assets exceeded his liabilities both at the beginning and at the end of each of those three calendar years, was what his net worth was at the beginning of 1944, and the end of 1944, and the end of 1944, and the beginning of 1945, at the end of 1945, at the beginning of 1946, and at the end of the calendar year 1946.

Now again to possibly assist the jury in following this evidence that will be produced by the government, certain businesses, in which the government contends Mr. Remmer had an interest, either sole or partial, will be produced and they will relate, besides the interest in Cal-Neva, to nine other businesses or clubs, six of which were situated in San Francisco, California, and three of which were situated in the community of El Cerrito in Contra Costa County, State of California, and further pointing to the testimony in that regard, I might state the names of those clubs or businesses are as follows: That the six businesses in San Francisco, in reference to which the government will offer evidence as showing the interest of Elmer Remmer in the same, are: B-R Smoke Shoppe, 186 Club, Day-Night Cigar Store, 110 Eddy, Menlo Club, and Transit Smoke Shop; and that the three businesses in El Cerrito, Contra Costa County, California, were known as the San Diego Social Club, 21 Club, and the 311 Club.

Now here I have already stated that the net worth computation method would be applied and evidence will be brought before you for your consideration as to the application of that method of computation of taxable income for each calendar year as to these businesses and the method of computation for all, as the evidence will be developed, will be the same. The net worth, which is the difference between the assets and the liabilities, of each of these clubs and businesses, ten in number, including Cal-Neva, as to the beginning of each

calendar year and as to the end of each calendar year of 1944, 1945, and 1946, will be shown and then, depending upon the evidence as to the particular interest of the taxpayer in the particular club or business which has shown an increase in net worth, there will be, under the government's contention, a proportionate chargeable interest in the way of taxable income to the defendant, Elmer F. Remmer, for that particular calendar year, by reason of his interest in that club or business which has produced the income resulting in increased net worth between the beginning of any particular calendar year and the end of any particular calendar year.

I have outlined again the charges in the indictment and I have tried to outline for your consideration the character and type of evidence that will be brought before you. I have referred to the net worth method of tax computation that the evidence will refer to here. After the proper allowance has been made for the elements of gifts received, inheritance, borrowed money, that there remains in all income, whether that income be earned income or income by profits from a business or from a club. Now essentially that evidence will be developed from the testimony of witnesses, the introduction of documents, and through the tendered testimony of further witnesses correlating and connecting these many references which, standing perhaps alone and isolated, may not have their full connection apparent to you in connection with the

government's charge at the time that they are offered individually for your consideration.

I will say once more it is recognized that the government has the burden of establishing the elements of the charge contained in each of the six counts beyond a reasonable doubt.

Supplement to Plaintiff's Opening Statement

Thursday, November 29, 1951

Mr. Pike: Your Honor, just prior to the recess of court yesterday afternoon, I made an opening statement to the jury. At this time, with permission of the Court, I wish to add to and amplify that statement in certain particulars.

The Court: You may do so.

Mr. Pike: I wish to state that the government will introduce evidence to establish each of the elements of the offense charged in each of the six counts of the indictment in this case. In other words, the government expects to prove each of those charges and each of the elements contained in each of those six charges by competent legal evidence brought before this jury for its consideration, and as to the elements of the offense charged in each of the six counts, I might say that the evidence brought before you by the government for your consideration, and for the purpose of establishing in the mind of each of you beyond a reasonable doubt to establish the guilt of the defendant in this case, that evidence will be produced by the government to show that, as to the particular calendar year charged in the respective counts of the

indictment, the defendant, Elmer F. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States in the particular calendar year referred to in the count of the indictment, by filing and causing to be filed with the Collector of Internal Revenue of the Internal Revenue office of Reno, District of Nevada, a false and fraudulent income tax return, wherein he stated that his net income—or, as the case may be as to certain counts, as I explained yesterday, the net income of his wife, Helen L. Remmer—during each of these three calendar years, 1944, 1945, and 1946, was a certain stated amount and that the amount of tax due and owing thereon was a certain stated amount as given in these particular counts of the indictment; and the evidence will further show that the defendant, Elmer F. Remmer then and there well knew that his net income for that said calendar year, computed on the community property basis, or the income of his wife, Helen L. Remmer, for that particular calendar year, according to the particular count of the indictment, similarly computed, was a larger sum than that filed in his income tax return and that the tax payable on the larger and greater sum of income, which the government will offer evidence to prove and with the intent of proving, was larger than the tax which the defendant paid, or caused to be paid. The government expects to produce evidence before you to prove that the amount of income reported in these false and fraudulent income tax returns, either filed or caused to

be filed by the defendant, as charged in each of the counts of the indictment, was larger in fact than the amount reported in the returns, and that there was an additional tax due the government as charged in each of the counts. Further, such evidence will be brought before you to establish, on behalf of the government's charge in this case, that at the time the defendant filed, or caused to be filed, each of these income tax returns, that he knew that they were false and fraudulent and that he filed them, or caused them to be filed, in each instance as charged with the Collector of Internal Revenue in this district in a wilful and knowing attempt to defeat and evade a large part of the income tax due and owing by him or from his wife in those instances where the particular count of the indictment refers to returns of Helen L. Remmer, a large part of the income tax due and owing the United States for that particular calendar year.

And further the evidence brought forward by the government will show that there was not only additional income received that was not reported in these false returns, but there was a tax due the government for each of the calendar years on such additional income besides that reported in the return, and that besides the intent to actually file a false and fraudulent return, the defendant did actually file, or cause to be filed the false and fraudulent return, in an attempt to evade the payment of a large part of the tax, as stated, all as alleged in each of the six separate counts of the indictment in this case.

The Court: Does the defendant desire to make an opening statement now or reserve it?

Mr. Golden: We reserve it, your Honor please.

Thursday, November 29, 1951

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

Motion by Mr. Golden for acquittal.

Statement by Mr. Pike supplementing opening statement.

HOMER H. FORRESTER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, please.

A. Homer H. Forrester.

Q. Where do you live?

A. 1395 Nixon Avenue, Reno, Nevada.

Q. What is your employment?

A. I am employed with the Bureau of Internal Revenue as assistant collector for the District of Nevada.

Q. How long have you been employed as assistant collector of Internal Revenue for the District of Nevada? A. Since November of 1944.

Q. What are the duties of the office of collector of Internal Revenue for the District of Nevada, with regard to the receipt and filing of income tax

(Testimony of Homer H. Forrester.)

returns of residents of the District of Nevada and the maintenance of returns so filed as a permanent record?

A. It is the duty of the collector to collect and assess income tax returns due the federal government and to maintain a [14*] record of the returns filed and the amounts of tax paid.

Q. Are returns on persons who are residents, or who claim to be residents, of the District of Nevada filed with the office of the collector at Reno, Nevada? A. Yes.

Q. And that applies to the income tax returns of those people? A. Yes.

Q. Are those returns so filed maintained in your office as official records of the Collector of Internal Revenue for this district? A. Yes.

Q. Have you brought with you, from the records of the office of the Collector of Internal Revenue for the District of Nevada, an income tax return for Elmer F. Remmer, sometimes known as Elmer Remmer, for the calendar year 1944?

A. I have.

Q. Will you produce it please? Mr. Forrester, I show you Plaintiff's Exhibit 1 for identification.

Mr. Gillen: May we see that?

Mr. Thompson: You may see it in a minute. I haven't offered it yet.

Mr. Gillen: Well, it is marked.

The Court: Let him proceed for a moment. You will have an opportunity to see it, Mr. Gillen.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Homer H. Forrester.)

Q. Mr. Forrester, is Plaintiff's Exhibit 1 for identification [15] an income tax return filed for Elmer F. Remmer for the calendar year 1944 taken from the official records of the Collector of Internal Revenue for the District of Nevada?

A. Yes.

Mr. Thompson: I offer it in evidence, your Honor.

(Exhibits 1 to 12, inclusive, marked for identification.)

(10 minute recess taken at 10:55.)

MR. FORRESTER

resumes witness stand.

The Court: They will be admitted without any qualification.

(Discussion between Court and counsel.)

Q. Mr. Forrester, I show you Plaintiff's Exhibit 9 for identification and ask whether that is official record which you have taken from the office of the Collector of Internal Revenue for the District of Nevada? A. It is.

(Discussion.)

Mr. Thompson: I offer in evidence Plaintiff's Exhibits 9, 10, 11, 12, 7 and 8 for identification.

(Objection and discussion.)

(Jury excused at 11:20.)

(Argument by Mr. Avakian in absence of the jury.)

(Reply by Mr. Shelton.)

(Jury returned into court and excused for noon recess.) [16]

Afternoon Session—November 29, 1951, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. FORRESTER

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Forrester, have you caused a search of the records of the office of the Collector of Internal Revenue for the District of Nevada to be made for the purpose of determining whether or not Elmer F. Remmer filed with the Collector of Internal Revenue for the District of Nevada any federal income tax returns in addition to those which now are in evidence as Plaintiff's Exhibits 1 to 12, inclusive?

Mr. Gillen: Objected to first of all as incompetent, irrelevant and immaterial; income tax returns for any other years other than those mentioned in the indictment are not involved, and second, on the ground it is calling for hearsay evidence unless the witness made personal search himself.

(Testimony of Homer H. Forrester.)

The Court: Answer that question yes or no.

A. Yes.

Q. And what period of time did that search cover? A. The years you mean?

Q. Yes. A. From 1934 through 1941.

Q. Are there any returns on file in the office of the Collector of Internal Revenue for the District of Nevada for Elmer F. [17] Remmer for the years after 1934 to and including 1941?

Mr. Gillen: Just a moment. My objection—

The Court: To that I would sustain an objection.

Mr. Thompson: What is the objection?

The Court: It is hearsay obviously. He caused a search to be made but he didn't testify he made it.

Mr. Gillen: On the additional ground, may it please your Honor, it is incompetent, irrelevant and immaterial.

Q. Mr. Forrester, did you personally make the search? A. No.

Q. Was the search made by employees of the office of the Collector of Internal Revenue for the District of Nevada under your supervision and direction?

Mr. Gillen: I think that would be hearsay, too. If it is competent material evidence at all, the party who made the search should be brought in.

The Court: You may answer this question.

A. Yes.

Q. And was the report made to you by the em-

(Testimony of Homer H. Forrester.)

ployee of that office after the search was concluded?

Mr. Gillen: Objected to as calling for hearsay.

The Court: Answer yes or no.

A. Yes.

Q. Are there any income tax returns for Elmer F. Remmer on file in the office of the Collector of Internal Revenue for the District [18] of Nevada for the years after 1934 and including 1941?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial first, and, second, calling for hearsay, and third we assign asking of the question, in view of your Honor's indicated ruling, as misconduct on the part of the attorney.

The Court: I think it may be hearsay. Objection sustained.

Q. Mr. Forrester, after income tax returns are received and filed in the office of the Collector of Internal Revenue for the District of Nevada, what, if any, official record was made in your office of assessments, based upon returns filed?

(Objection as hearsay—discussion.)

The Court: The witness may answer this question.

A. After the returns are received in the Collector's office, an assessment list is prepared, listing the name and address of each taxpayer filing the return, showing the amount of tax as per the return and the amount of payments made with the return.

(Testimony of Homer H. Forrester.)

Q. Mr. Forrester, you have testified, I believe, that you have been employed as assistant collector of Internal Revenue for the District of Nevada since 1944 to and including the present date, is that correct? A. That's right.

Q. Were you employed in the office of the Collector of Internal [19] Revenue for the District of Nevada prior to 1944? A. I was.

Q. During what years?

A. I was employed from January 2, 1941, as deputy collector until the early part of 1943 and from the early part of 1943 to November, 1944, as assistant chief of the field men.

Q. You have been continuously employed by the Collector since what date?

A. Since January 2, 1941.

Q. In the course of your employment have you had occasion to examine the records which were kept by the Collector in the years prior to 1941, as far back as the year 1934?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial, has no bearing on the issues in this case.

The Court: Objection will be overruled. Witness may answer.

A. I have.

Q. And do you know what records were kept and maintained by the Collector since 1934 in the regular and usual course of the operation of the business of that office? A. I do.

Q. Was an assessment list regularly kept and

(Testimony of Homer H. Forrester.)

maintained from the kind you describe in the office of the Collector of Internal Revenue at all times subsequent to the year 1934? [20]

Mr. Gillen: Again I offer the objection, it is incompetent, irrelevant and immaterial what he knew about the assessment list or anything between 1934 and 1941 because such things are not shown, we have not been advised they are in the contention in the indictment.

The Court: I don't see how he can testify.

Mr. Gillen: It is hearsay also.

The Court: I think he can testify as to having seen such records. I will sustain the objection.

Mr. Gillen: I would like to add to my objection it would be hearsay as to prior to 1941.

Q. Mr. Forrester, since the year 1934, in the regular course of the business of the office of the Collector of Internal Revenue have records been kept and maintained which include an assessment roll of the kind you describe?

Mr. Gillen: Just a moment—I am going to offer an objection, may it please the Court, counsel is attempting to adopt regular course of business doctrine and it is calling for hearsay and that doctrine only applies—

The Court (Interceding): I think so.

Q. Mr. Forrester, are you familiar with the law and regulations governing the management of the office of Collector of Internal Revenue prior to the year 1941?

(Testimony of Homer H. Forrester.)

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial, whether he was familiar. [21]

The Court: Objection overruled. You may answer the question.

A. I am, as far as the particular item that was mentioned.

Q. Do you know whether or not under the regulations in effect subsequent to the year 1934, the Collector has been required to keep and maintain an assessment roll of the type you have described?

Mr. Gillen: To which I offer an objection.

The Court: Objection overruled. You may answer the question.

A. Yes.

Q. And in your examination of the records of the office of the Collector of Internal Revenue for the District of Nevada have you found any instances of such assessment rolls for this succeeding the year 1934?

Mr. Gillen: Same question, your Honor, has already ruled upon; hearsay, not material also.

The Court: Objection overruled. That is not the same question I ruled on.

A. I have.

Q. Have you personally examined those assessment rolls?

Mr. Gillen: I offer the objection it is incompetent, irrelevant and immaterial and respectfully invite the Court's attention to the fact that we are now concerning ourselves with matters ten years

(Testimony of Homer H. Forrester.)

prior to the year that is called the initial [22] year in this indictment.

The Court: Objection overruled. Answer the question.

A. I have.

Q. Is there any record on the assessment rolls of the office of the Collector of Internal Revenue for the District of Nevada for the years succeeding the year 1934 of any income tax assessments made against Elmer F. Remmer or Elmer Remmer, with the exception of the years 1942, 1943, 1944, 1945, and 1946 and a delinquent return filed in 1937 for the year 1934?

Mr. Gillen: May it please your Honor, we offer an objection, first it is incompetent, irrelevant and immaterial; objection secondly that the assessment rolls would be the best evidence and not this man's interpretation or recollection of what he may have seen at some time or other. We also assign asking such question as misconduct, on the ground it is calling for evidence of matters or things and referring to matters or things which we are not charged with. I admonish the jury we are only concerned here with the truth of the charges concerning this defendant's returns for the years 1944, 1945 and 1946 and I charge that these questions are only being asked for the purpose of casting some sort of aura of suspicion or cloud upon this defendant.

(Discussion.)

(Testimony of Homer H. Forrester.)

Mr. Gillen: I am going to offer further objection, may it please the Court, on the contention that counsel made with [23] regard to the certificate. The certificate would undoubtedly have to be from the collector himself.

The Court: Objection will be overruled. You may answer the question.

Mr. Thompson: Before the answer is made, your Honor, I would like to modify the question by excluding the years after 1946.

The Court: Do you understand that now?

A. Yes. There were no entries made on our assessment list other than the ones mentioned.

Q. What is the source of the information from which the assessment list is made up?

A. The information contained on the income tax returns filed by taxpayers with our office.

Q. And if a tax return had been filed in any year showing a tax due from the taxpayer, in the ordinary and regular course of the business of the operation of the office of the Collector of Internal Revenue, would that have appeared as an entry on the assessment list?

Mr. Gillen: I offer the objection it is leading and suggestive and also asking for hearsay. It is asking him to speculate as to whether somebody before he was in the office in 1941 would have kept a record in a certain way.

The Court: Objection overruled. You may answer the question. [24]

Q. Mr. Forrester, I show you Plaintiff's Exhibit

(Testimony of Homer H. Forrester.)

1, an income tax return for the calendar year 1944 for Elmer F. Remmer, and call your attention to the entry, "Balance of tax due \$1070, interest \$5.35," with a total of \$1075.35. Have you brought with you any record from the office of the Collector of Internal Revenue for the District of Nevada showing whether or not that tax was paid by the taxpayer, and if so, when it was paid?

A. I have.

Q. Will you produce it please? This is a duplicate?

A. It is prepared in duplicate, yes.

Q. I show you Plaintiff's Exhibit 13 for identification, Mr. Forrester, will you state what that is?

A. It is a certificate of assessments and payments.

Q. And what does it cover, generally?

(Not answered.)

Q. Mr. Forrester, is Plaintiff's Exhibit 13 for identification a record which the Collector of Internal Revenue for the District of Nevada is required to make under the regulations?

A. It is.

Q. At whose request?

Mr. Gillen: That will be calling for hearsay.

The Court: Objection will be overruled. Answer the question.

Mr. Gillen: Under the regulations at whose request, is calling for hearsay.

(Testimony of Homer H. Forrester.)

The Court: Maybe it is. I will sustain the objection. [25]

Mr. Thompson: I offer Exhibit 13 in evidence, your Honor.

Mr. Gillen: We offer the objection, may it please the Court, that the exhibit contains matter which is incompetent, irrelevant and immaterial, in no wise binding upon this defendant. Contains matter which is not involved in the time boundaries cited in the indictment, to wit, the years 1944, 1945 and 1946 and I would like your Honor to have an opportunity to look at the exhibit and your Honor will observe what I mean.

The Court (Examines exhibit): Objection will be overruled. It will be admitted in evidence, Exhibit 13.

Mr. Gillen: May I then have an opportunity to offer objection to certain portion of that exhibit, the portion which relates to the year 1934 and any other year up to the year 1944, as being entirely incompetent, irrelevant and immaterial.

The Court: Same ruling, objection overruled.

(Discussion.)

Q. I show you Plaintiff's Exhibit 13, Mr. Forrester, will you state what it is?

Mr. Gillen: Objected to as being asked and answered.

The Court: Objection overruled.

Mr. Gillen: The further objection is offered, may it please the Court, that the paper itself is the best evidence and it is in evidence.

(Testimony of Homer H. Forrester.)

The Court: Objection overruled. Answer the question. [26]

A. It is certificate of over-assessments and payments to the income tax and estimated tax assessed and paid by Elmer F. Remmer. Assessment rather than overpayments.

The Court: Do you want to make a correction?

A. Certificate of assessment and payments. Of the income tax and payments made by Elmer F. Remmer for the year 1934 and year 1946.

Q. And in column 1 of Plaintiff's Exhibit 13 what information is given?

Mr. Gillen: Just a moment. That refers to a year not involved, may it please the Court, as your Honor will see from the indictment. I think it is incompetent, irrelevant and immaterial.

The Court: What is your answer?

A. The taxable period.

The Court: There is nothing before the Court. You may proceed.

Q. Is that given on that exhibit in terms of calendar years; that is, taxable period calendar year 1943 or 1946, as the case may be? A. It is.

Q. In column 2 what information is given?

A. The list and year.

Q. By list, what do you mean?

A. It is merely an identification, whereby we can locate previous [27] returns and assessments.

Q. In column 3 what information is given?

A. The account number and the page or line on which it is assessed on our assessment roll.

(Testimony of Homer H. Forrester.)

Q. In column 4 what information is given?

A. The amount of tax assessed.

Q. In column 5 what information is given?

A. Well, 5 and 6 contain the dates the payments were made and the amounts paid.

Q. I show you Plaintiff's Exhibit 14 for identification, Mr. Forrester, relating to the tax paid by Helen L. Remmer, is that a record which the Collector of Internal Revenue for the District of Nevada is required to make under the regulations?

(Discussion by counsel and Court regarding showing of exhibits before identified.)

(Jury admonished and excused at 2:12.)

(Argument in absence of the jury.)

2:15 P.M.

(Jury and alternate jurors returned into court.)

(Last question read.)

The Court: Answer the question.

A. It is.

(Exhibit 14 admitted in evidence over objection.)

(Discussion.)

Q. Mr. Forrester, you have already testified regarding the information set forth in the different columns on Exhibit 13 [28] which is a certificate of assessment and payments for Elmer F. Remmer.

(Testimony of Homer H. Forrester.)

Is Exhibit 14 a certificate of assessments and payments for Helen L. Remmer the same type of document, with the same character of information set forth under each column as to that taxpayer?

A. It is.

Q. I show you Plaintiff's Exhibit 15 for identification, Mr. Forrester, is that an official record taken from the records of the office of the Collector of Internal Revenue for the District of Nevada?

Mr. Gillen: We offer the objection, may it please the Court, it is incompetent, irrelevant and immaterial. If your Honor will observe the exhibit, your Honor will find it is a so-called floor tax of a corporation and not any individual return or report or evidence of payment or the evidence of any money by the individual defendant in this case. It is floor tax of a corporation.

The Court: Objection overruled. Answer the question.

A. It is.

Q. Without referring to any of the information given on Exhibit 15 for identification, will you state what type of record that is?

A. It is a return of floor stock tax on distilled spirits, malt liquor and wines under the Revenue Act of 1943.

Q. Referring again, Mr. Forrester, to your examination of the [29] assessment lists in the office of the Collector of Internal Revenue for the District of Nevada, did you examine those lists for the years subsequent to 1934 for the purpose of

(Testimony of Homer H. Forrester.)

determining whether there were any entries thereon relating to the assessment of income taxes against Helen L. Remmer?

Mr. Gillen: We offer the objection, may it please the Court, it is incompetent, irrelevant, and immaterial, not binding upon this defendant.

The Court: Objection will be overruled. You may answer the question.

A. It was done by employees under my supervision.

Q. Did you find a record of any entry in the assessment lists of the office of the Collector of Internal Revenue for the District of Nevada for the years from 1934 to 1946, inclusive, showing the assessment of any federal income tax against Helen L. Remmer?

Mr. Gillen: Just a moment. We offer the objection it is assuming something not in evidence. He said he didn't make the search himself—calling for hearsay; third, it refers to another person, not binding on the defendant, and fourth, includes years other than those involved here, and for that reason is incompetent, irrelevant and immaterial.

The Court: The hearsay feature of this objection is good.

Q. Mr. Forrester, do I understand that you did not personally [30] examine the assessment lists as to Helen L. Remmer? I am not talking about search.

A. I examined the lists. I was under the im-

(Testimony of Homer H. Forrester.)

pression it was the search, the same as made in the case of Elmer Remmer.

Q. I did not refer to search for income tax returns. I referred to an examination of assessment lists, similar to the one that you made for Elmer F. Remmer.

A. I have examined that, yes.

Mr. Thompson: May I have the question?

(Question read.)

Mr. Gillen: Same objection, with the exception of the portion assuming something not in evidence.

The Court: Objection overruled. Answer the question.

A. There were entries in connection with 1934 return.

Q. And were there entries in connection with the years 1942, 1943, 1944, 1945, and 1946 returns?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial, referring to another person other than the defendant in this case and also referring to years other than the years that are involved in the indictment in this case.

(Further argument.)

The Court: Objection will be overruled. You may answer the question.

A. There were. [31]

Q. Were there entries of federal income tax assessment in the assessment lists relating to Helen L. Remmer for any year other than those you have

(Testimony of Homer H. Forrester.)

mentioned, that is, the year 1934 and the years 1942 to 1946, inclusive? A. There were not.

Mr. Gillen: May I move to strike the testimony again on the ground that the assessment roll itself would be the best evidence what the assessment roll contained?

The Court: Motion denied.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Forrester, in direct examination this morning you answered Mr. Thompson with regard to the duties of the Collector of Internal Revenue, and I take it that you included in those the duties of the deputy of the Collector of Internal Revenue, is that correct? A. Yes, sir.

Q. And among the duties of the Collector and also the deputies are the duties of assisting taxpayers in preparing their income tax returns, is that true? A. That is right.

Q. And as a matter of fact, there are times when practically everybody in your office is assigned to those duties, is that true?

A. That is right. [32]

Q. And it is a regulation, and encouraged in fact, that deputy collectors of internal revenue, and the collector himself, will assist any taxpayer or make out any taxpayer's return?

Mr. Thompson: That is already answered; incompetent, irrelevant and immaterial.

(Testimony of Homer H. Forrester.)

The Court: Objection overruled.

Q. Is that true?

A. Well, assist any taxpayer.

Q. Make out income tax returns?

A. In certain cases.

Q. In any case where a taxpayer brings data, you will show him how to make it out and make it out and have him sign it?

A. If the records are not so voluminous that we wouldn't have the required time; in other words, we can't do a man's bookkeeping.

Q. If it is going to take you four or five days, if he had that much data to go into, you would——

Mr. Pike: Objected to as argumentative.

Mr. Gillen: This is cross-examination, your Honor.

Mr. Pike: It is not within the scope of direct.

The Court: Let us not have any exchange between counsel. Let us go right along.

Q. Mr. Forrester, I am going to show you the prosecution's Exhibit 1 in evidence, which I will identify for you as the 1944 tax return of Elmer Remmer, as stipulated to by the defendant, [33] and ask you to look at the handwriting in the body of that document and tell us if you recognize that handwriting.

A. I couldn't positively say that I recognize it. It is familiar.

Q. Would you say that was the handwriting of Mr. Pat Mooney of the Internal Revenue office in this District?

A. It appears to be so.

(Testimony of Homer H. Forrester.)

Q. By the way, are you familiar with the signature of Elmer F. Remmer?

A. Only as it is shown on the returns.

Q. And I notice at the bottom of the first page of that exhibit there is a reference made to what collector's office was any prior payment made, is that true, bottom of left-hand side? A. Yes.

Q. And that means that a taxpayer might make a return and a payment to any one of the internal revenue collector's offices of the United States, is that true?

A. It means he could file a declaration of estimated tax in any other collection district, yes.

Q. And it also means that he could make a payment at any other collector's office, does it not?

A. Not to what payment office did he pay the amount—that refers only to the estimated tax for the current year.

Q. Doesn't it say, "If you filed a return for a prior year, what was the last year," and immediately after that, "To what [34] collector's office was it sent"?

A. That is correct, for a prior year.

Q. It doesn't say "the" prior year; it says "a" prior year, doesn't it? A. Yes.

Q. The fact of the matter is that a taxpayer could make a return to any district in the United States for any prior year, isn't that so?

A. That's right.

Q. I will ask you whether or not in your search for other returns that were made by the defendant

(Testimony of Homer H. Forrester.)

Elmer F. Remmer, if you examined records of every Internal Revenue district in every office of the United States or the District of Nevada?

A. Just the records for the District of Nevada.

Q. I am going to ask you to look at Plaintiff's Exhibit 5 for the year 1946 and there is attached to it a sheet of paper giving detailed explanation and I note under "Deductions" there is a deduction for a charitable contribution by Elmer F. Remmer to St. Thomas Aquinas Church at Reno in the amount of \$2500, and alongside that is a very small pencil notation, I can make out "OK" but can't make out the other words. I ask you to use that magnifying glass and tell us, if you know, what that indicates?

A. I can't make out the middle word.

Q. Would the middle word be the name of some member of the staff of the Collector of Internal Revenue? [35]

A. It is possible that it could be.

Q. Let me ask you this—do you make out "OK" before the middle word and "OK" after the middle word?

A. No, the last word appears to be "CK," the last letters.

Q. Are the first letters "OK"?

A. That is correct.

Q. And it is possible the last could have been "OK" too, but so written that it appears to be a "CK"?

A. That is possible.

(Testimony of Homer H. Forrester.)

Q. Let me ask you this—isn't it a fact that when a rather large charitable contribution is reported as deduction that it is the practice of your office to check and confirm or verify whether such a contribution was actually made, by going to the recipient of the contribution, is that correct?

A. In certain cases. I might state at this time that income tax returns filed with our office are segregated into collector's returns and Bureau or revenue agent's returns. We are not allowed to examine or audit or verify the collector's returns; I mean, the returns classified as Bureau or agent's.

Q. Let me ask you, from your knowledge of the workings of your office, is it possible that those notations on the side indicate that your office desired to verify whether or not such a contribution had actually been made by Mr. Remmer to the St. Thomas Aquinas Catholic Church at Reno and that it was confirmed and "OK" means that some agent OK'd it by verifying it at [36] the place of the recipient of the contribution?

Mr. Thompson: We object to the question upon the ground it calls for conclusion of this witness as to what was possible. It is purely speculation or inference as to what those notations mean. It is not based upon any knowledge that he may have in his capacity as deputy collector.

The Court: I will overrule the objection. You may answer the question.

(Question read.)

(Testimony of Homer H. Forrester.)

Q. Do you understand the question?

A. It is possible it was made with the idea of having the matter checked. As to whether it was checked and verified, I couldn't answer that question.

Q. "OK" and a name would indicate it was checked; the man who checked it said "OK"; in other words, verified it, isn't that so?

Mr. Pike: We object, it assumes something not in evidence, in that he says "and a name," because there is no evidence there is a name there.

The Court: Objection overruled. Answer the question.

A. It is possible.

Q. Of course, you wouldn't expect an agent, if he found it wasn't OK, to put OK on it?

A. It isn't the ordinary practice for our office or other agents to mark the returns. [37]

Q. Even in the Internal Revenue Department, OK means OK, doesn't it? A. Right.

Mr. Gillen: I think that is all.

Mr. Thompson: No further questions.

(Witness excused.)

JOHN A. HILL

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. John A. Hill; 559 Buena Vista Avenue, San Francisco.

Q. What is your employment or occupation?

A. Sales manager, Stanley Furniture Company, 739 Mission Street, San Francisco.

Q. Have you brought with you, pursuant to subpoena, certain records of the Stanley Furniture Company? A. I have.

(Jury and alternate jurors admonished and 15 minute recess taken at 2:45 p.m.)

3:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. HILL

resumes the stand on further

Direct Examination

By Mr. Thompson:

Q. State the name of the company by whom you are employed again. [38]

A. Stanley Furniture Company.

(Testimony of John A. Hill.)

Q. How long have you been employed by that company? A. Approximately 20 years.

Q. Are you acquainted with Mr. Elmer F. Remmer? A. I am.

Q. And do you see him in the courtroom?

A. Yes, sir.

Q. Would you designate him, please?

A. Sitting over there.

Mr. Gillen: We will stipulate he knows Mr. Remmer and Mr. Remmer is in the courtroom.

Q. In your capacity as sales manager for the Stanley Furniture Company during the years 1945 and 1946, did you have occasion to make sales for the Stanley Furniture Company to Mr. Remmer of articles of merchandise? A. I did.

Q. You have produced, Mr. Hill—

(Exhibit 16 admitted in evidence by stipulation of counsel.)

Q. Referring to the exhibit, Mr. Hill, will you testify what sales of merchandise you made to Mr. Remmer during the years 1945 and 1946?

A. According to these records here the first sale to Mr. Remmer was for some furniture for his office, 52 Mason Street, San Francisco. [39]

Q. On what date?

A. I believe it was sold 1945, October of 1945, and October, same month, there were about four purchases in the month of October, 1945, and January of 1946 three purchases, and there were about seven purchases in the years 1945 and 1946.

(Testimony of John A. Hill.)

Q. Did you personally make those sales to Mr. Remmer? A. I did.

Q. Will you state what the sales were and the amounts involved in each sale?

A. The original sale sold to Mr. Remmer was some office furniture for his office, 52 Mason Street. I think it consisted of some carpet for the floor, office desk and swivel chair and there was a purchase——

Mr. Gillen: I wonder if the witness could give the amounts?

A. That amount was \$517.63. That was for carpet and desk.

Mr. Gillen: I think it would facilitate the testimony to give the date and the amount of the item.

The Court: Can you do that?

A. Yes, October 17 purchase furniture——

The Court: That is what year?

A. 1945; some carpet and some office desk and chair and a refrigerator, small radio, and that was purchased in 1945.

Q. And the amounts?

A. The amounts of \$517.63, \$352.50, \$76.88, \$128.13, \$33.83; [40] and for the year 1946 he purchased some furniture for a home in El Cerrito, which consisted of what we call furniture home complete, for living room, dining room combination, and bedroom. The particular sale at that time was for \$3660.69.

Q. Referring to that purchase, Mr. Hill, did you

(Testimony of John A. Hill.)

participate in the delivery of that furniture to Mr. Remmer's home? A. I did.

Q. And what is the location of his home where that furniture was delivered?

A. Well, it was located at El Cerrito. I think it was next door to what was known over there at that time as the 21 Club.

Mr. Gillen: We stipulate that that address is 306 Panhandle, El Cerrito, Contra Costa County, California.

Q. Will you continue?

A. This particular furniture was selected by Mrs. Remmer, who came into our store and selected this furniture for her home, which we delivered the following week. After it was all set up in her home, we called Mrs. Remmer and asked her to go and inspect it and let us know what she thought of the furnishings, which she did. I believe the following day, or following week, she came in and made a few exchanges and that is about all there was to that. We made the exchanges.

Q. That one purchase of furniture for the home with the later exchanges constitutes the whole transaction for 1946, is that correct? [41]

A. No, I think there were a few—I don't have an itemized statement, but in 1946 there were three other sales they made, one \$25.63, one \$204.95, and one \$197.31.

Q. Do you recall now what those purchases consisted of? A. Offhand, no.

Q. Do you have any record with you to which

(Testimony of John A. Hill.)

you could refer to determine what those purchases consisted of?

A. October 11, 1945, the amount of \$352.50 was for his office furniture.

Mr. Gillen: That was item you mentioned before.

A. There was refrigerator and some carpet.

Mr. Gillen: I think those items were mentioned.

A. Well, I am trying to refer to the things he asked me if I had a record of the exact things.

Q. You can't designate the balance of those other three items the latter part of 1946 that you referred to? A. I do not have the record.

Q. Mr. Hill, by again referring to Exhibit 16, will you testify when and on what dates and in what amounts Mr. Remmer made payment for the merchandise purchased?

A. Well, this first purchase in October, 1945, all of his purchase on November 15, 1945, amount was paid in full, the check, \$1075.14; and the purchase of 1946, some of the purchase of April 30th was check paid \$208.13, on April we received a check for \$197.31, and on May 10th we received check for \$22.45. On [42] his sale of June 18, 1946, we received—well, on June 2nd we received check for \$230.63, June 28 received a check for \$513.63, and on July 9th we received a check for \$204.95. Then we didn't receive any money until 1947 which, in February, I believe, we received a payment of a thousand dollars by check.

(Testimony of John A. Hill.)

Mr. Gillen: Might I inquire, are we referring to the 1946 bill?

A. Yes, 1946 bill wasn't all paid at one time. It was paid at different times and in different amounts.

(Discussion.)

The Court: It is understood that payments shown on Exhibit 16 after 1946 are not material, so that is the reason why the testimony regarding the last payment in 1947 was stricken. Anything stricken during the course of the trial is not to be considered as evidence by the jury.

Q. Mr. Hill, I would like to call your attention to Plaintiff's Exhibit 16 and credit item of one thousand dollars, and ask you whether or not that exhibit does not show that that payment was made on December 27, 1946?

A. That's right, December 27, 1946, one thousand dollars.

Mr. Gillen: The witness was in error when he said February, '47?

A. Yes.

Mr. Thompson: You may cross-examine. [43]

Cross-Examination

By Mr. Gillen:

Q. Mr. Hill, you say that you are the sales manager of the Stanley Furniture Company on Mission Street in San Francisco and been with that concern for more than 20 years?

A. Right.

(Testimony of John A. Hill.)

Q. It is true, is it not, that your company also owns the Sierra Furniture Company in Reno, Nevada, is that correct? A. That is right.

Q. And your acquaintance with Mr. Remmer extends back to the time when Mr. Remmer was operating Cal-Neva, he did considerable business with the Sierra Furniture Company in the matter of furnishing Cal-Neva, is that correct?

A. That is correct.

Q. And then subsequently in California he still did business with your firm under the name of Stanley Furniture Company?

A. That is correct.

Q. Now there are three items here, Mr. Hill, that I want to ask you to enlighten us on. I don't know whether they are items that refer to furniture purchases for Mr. Remmer's home or furniture purchases for his office. There was an item—I will hand you this ledger sheet, Exhibit 16, and I will tell you the items I have in mind and perhaps you can tell us—there is a transaction reflected on March 25, 1946, for \$25.63, another item of March 25, 1946, for \$204.95, and another item for April 5, 1946, of \$197.31. Can you tell us from any records you have [44] there what those purchases were and were they for the home or for the office?

A. I believe those purchases was for radio and refrigerator—I don't know what the other was for. I know one was for radio and the other refrigerator, but the other purchase I do not recall. I don't have the record with me.

(Testimony of John A. Hill.)

Q. You have identified radio and refrigerator?

A. That is correct.

Q. Is there any way for you to determine whether they were delivered to the Mason Street office or the home in El Cerrito?

A. They were delivered to Mason Street.

Q. Do you recall whether purchases made for the office were paid by business check or were paid by personal check by Mr. Remmer?

A. Paid by business check.

Q. On that ledger sheet that you hold in your hand, prosecution's Exhibit 16, were any of those items that are reflected there as credits, would that be return of merchandise as well as payments?

A. They could be, yes.

Q. In other words, giving credit for, well, let us take an arbitrary figure, there is an item of \$500, it might be for return of \$500 item of merchandise rather than payment of cash?

A. That is right.

Q. I believe you said Mrs. Remmer, after inspecting the furniture [45] in her home, did make some exchanges? A. She did.

Re-Direct Examination

By Mr. Thompson:

Q. Mr. Hill, referring to Exhibit 16, which items on that exhibit reflect exchange of merchandise rather than payment? I notice you testified certain of them represented payments by check.

(Testimony of John A. Hill.)

A. Our bookkeeper writes up credit first as a sale, so unless I have each individual sale here, I would not be able to tell. For instance, if she sent back a chair for \$200 plus sales tax, she automatically enters credit against our store, which goes in the same as cash sale, that they don't owe us any more, so I would have to have each one individually before I could truthfully say which was which.

Q. What, by that record, Exhibit 16, enabled you to testify that certain payments for refrigerator and radio were made by a business check of Mr. Remmer rather than a personal check?

A. Well, because most of these collections were collected by me personally. I used to go up there personally to collect them.

Q. Most of them were?

A. That is right.

Q. Which ones on this represent personal collections by you in payment of the amounts owed by Mr. Remmer?

A. Truthfully I couldn't say. There are quite a few of them [46] here. Mr. Remmer would be out of town a considerable amount of time and if something was due us, I would generally go up to his office and collect it. I wouldn't have any way of telling you which were the credits and which ones he gave a check.

Q. Referring to the payments made by Mr. Remmer for furniture purchases for the home in

(Testimony of John A. Hill.)

El Cerrito, which ones of the credits on Exhibit 16 represent payments?

A. Well, I believe this one here of—I think, the \$204.95 was a credit and I believe the \$86.36 was a credit and I believe the other ones were payments that were made.

Q. You say the other ones were payments?

Mr. Gillen: He says he believes they were payments.

A. I believe the other ones were payments made.

Q. And you believe the two you mention were credits for the return of merchandise, is that correct?

A. That is my knowledge of it, yes.

Q. Again examining the record that you have, Exhibit 16, Mr. Hill, isn't it true that credits for returned merchandise is designated by the symbol "cr" and payments for merchandise by the symbol "cs"?

A. That is right.

Q. Again referring to that exhibit, will you testify which of the credit items represent payments by Mr. Remmer and which of them represent credits on account for returned merchandise?

A. On June 28th he has a credit of \$230.63. On June 28th there [47] is a credit of \$513.63, and I believe the other one is February 24th, which would be a credit of \$86.36.

Q. Which ones, according to that record, represent cash payments?

A. Do you want them all the way down?

Q. I think you had better, in view of the fact we now have a method of identifying them.

(Testimony of John A. Hill.)

A. Well, November 15th cash payment——

Q. What year please?

A. 1945. A cash payment of \$1075.14. January, 1946, we have cash payment \$33.83. Then on April 3 of 1946 we have a payment of \$208.13. On April 15th we have a payment of \$197.31.

Q. That is 1946 also?

A. That is 1946 also. And on May 10th we have a payment of \$22.45. Then on June, 1946 we have a payment of \$204.95 and on December 27th a payment of a thousand dollars.

Mr. Thompson: That is all.

Recross-Examination

By Mr. Gillen:

Q. When you mention cash payments you don't necessarily mean actual cash; you might mean also a check, but you are using that term to distinguish from a credit for returned merchandise, is that correct? A. That is correct.

Q. What does the symbol "sj" mean? The little symbol "sj," what does that mean?

A. I don't know. [48]

Q. It is a symbol of your bookkeeper, is that correct? A. Yes.

Q. What does the symbol "sc" mean?

A. I believe that means payments of cash.

Q. You believe it means, are you sure?

A. I believe "cs" cash payments, "cr" means credit.

Q. Are you positive?

(Testimony of John A. Hill.)

A. I am not positive.

Q. In other words, that is some symbol your auditing department uses? A. Yes.

Q. You don't know then which would be credit for returned merchandise and which would be credit for actual payments?

A. No, I do not.

Mr. Gillen: I think that is all.

(Witness excused.)

CHARLES J. SCOLLIN,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Charles J. Scollin.

Q. Where do you live?

A. 52 Sotello Avenue, San Francisco.

Q. What is your business or occupation?

A. Insurance brokers. [49]

Q. Are you a member of a firm or are you employed by some one? A. Member of the firm.

Q. What is the firm's name?

A. Tinneman, Bridgeford & Rainey.

Q. Where is the office of that company located?

A. 333 Montgomery Street, San Francisco.

Q. Are you personally acquainted with Mr. Elmer F. Remmer? A. I am.

(Testimony of Charles J. Scollin.)

Q. You recognize him in the courtroom?

A. Yes.

Q. During the years 1945 and 1946 did your firm have occasion to sell insurance to Mr. Remmer? A. We did.

Q. Have you brought with you a record kept and maintained by your firm relating to those transactions?

Mr. Gillen: Is this document the original kept in the ordinary course of business or is it a document especially made up?

A. That is a document that our bookkeeping system had changed since that time.

Q. What I want to know, is this document that is part of the record that was kept the original document?

A. That is the original of what was taken from our bookkeeping system since changed. That is our new bookkeeping system.

Q. That is a copy of the original entries, is that so? [50]

(Discussion.)

The Court: You may proceed.

Q. (By Mr. Thompson): Mr. Scollin, showing you Plaintiff's Exhibit 17 for identification, will you state whether or not that is a record kept and maintained by your firm in the usual and regular and customary course of its business?

A. It is.

Q. And is it a part of the business of your firm

(Testimony of Charles J. Scollin.)

to keep and maintain a record of that character?

A. It is.

Q. Does this record, Exhibit 17 for identification, relate to transactions had by your firm with Elmer Remmer or Helen Remmer during the years 1945 and 1946?

A. It does.

Mr. Thompson: I offer it in evidence, your Honor.

Mr. Gillen: Just a moment. I am going to object to that, no proper foundation laid to determine whether or not it is an original entry.

The Court: Do you want to examine him a little on that question?

Mr. Gillen: Yes, I would like to, your Honor.

Q. (By Mr. Gillen) Mr. Scollin, when was this document that is now designated prosecution's Exhibit 17, when was it made up?

A. When was that particular document made?

Q. Yes. [51]

A. That was made up no doubt by the bookkeeper when we received that subpoena.

Q. Then it is not an original record?

A. Of our new bookkeeping system.

Q. Sir, it is not an original record, is it?

A. Of our new bookkeeping system, it is.

Mr. Gillen: I ask that the answer be stricken as not responsive and that the Court request the witness to answer.

The Court: Motion denied.

Q. This record was made up for the purpose of bringing it to court, was it not?

(Testimony of Charles J. Scollin.)

A. That is right.

Q. The original transactions are reflected somewhere else, is that not so? A. That is right.

Q. So this is not an original record, is it?

A. That is right.

Q. That is what I tried to get at. Where are the original records?

A. If we have them, they most likely are in the warehouse, though I couldn't verify whether they were destroyed. They most likely are in the warehouse.

Q. Then when did you get your subpoena?

A. It is dated here November 16th.

Q. You got your subpoena November 16th. [52]

A. It is dated that, yes.

Q. Of 1951? A. 1951, yes.

Q. And right after you got your subpoena this was made up from an original record?

A. Undoubtedly it was. I had nothing to do with it.

Q. You don't know?

A. That I don't know.

Q. So then when you answered that this reflected business that your firm did with Mr. Remmer and Mrs. Remmer, you were not acquainted with those facts of your own knowledge?

A. Will you repeat that?

Q. You were not acquainted whether these represented actual business transactions with Mr. Remmer and Mrs. Remmer, of your own knowledge? You simply received the subpoena to come up here

(Testimony of Charles J. Scollin.)

and your bookkeeping department made up something and you brought it up here, is that correct?

A. That is taken from our records first.

Q. Did you see it taken from your original records? A. No.

Q. So you don't know of your own knowledge?

A. No.

Q. And you say you don't know whether or not those original records have been destroyed between November 16th of this year, this current month, destroyed or not? [53]

A. I say undoubtedly they would not be destroyed.

Q. You don't know where the original records are now but you know these are not original records? A. That is right.

Mr. Gillen: May it please the Court, we offer the objection the original records are the best evidence; also this witness is completely uninformed as to whether or not these truly reflect matters of original entry in connection with any transactions between his firm and Mr. Remmer or Mrs. Remmer.

The Court: He stated he had nothing to do with these, Mr. Thompson.

Mr. Thompson: May I inquire?

Q. (By Mr. Thompson): When did you say your bookkeeping system changed?

A. I believe it was at least three years ago.

Q. And at the time the bookkeeping system was changed, was a new set of books set up?

A. Yes.

(Testimony of Charles J. Scollin.)

Q. Based upon the present records?

A. That is right.

Q. And at that time were inactive accounts transferred to the new records?

A. I don't believe inactive accounts would be transferred.

Q. Is the record which we now have before us of the account for Elmer Remmer and Helen Remmer the same type of record which [54] your firm kept and maintains of other clients with whom they did business in 1945 and 1946?

Mr. Gillen: Just a moment. He has already testified, been asked and answered, that there was a different type of bookkeeping system maintained at that time.

(Discussion between counsel.)

Mr. Gillen: If your Honor will permit me, I would like to ask a question or two more of the witness.

The Court: Yes.

Q. (By Mr. Gillen) Mr. Scollin, did I understand you to say that you were a member of the firm of Tinneman, Bridgeford and Rainey?

A. Yes, sir.

Q. And have been such for how long?

A. January of this year.

Q. How long have you been with that firm?

A. Since November 1, 1945.

Q. I note that the subpoena is in typewriting and is directed to the firm, is that correct?

(Testimony of Charles J. Scollin.)

A. Yes.

Q. And I take it that the reason you are here is that you have been designated by your firm as the member of the firm to appear in obedience to this subpoena, is that correct?

A. Yes.

Q. I notice on the second page, where it sets forth the records there are certain pencilled notations which appear to compare [55] with the typewritten transcript which you have presented here, is that true?

A. That is true.

Q. Now that means that somebody in your firm, some stenographer or clerk, dug up that information out of the old bookkeeping system, is that not true?

A. This is Mrs. Bridgeford, a member of the firm.

Q. She went into the books of original entry and dug out that information, is that correct?

A. Correct.

Q. And then the document, which is now designated prosecution's Exhibit 17, was made up from those pencilled notations that she jotted down on the subpoena, is that correct?

A. I presume so.

Q. And that was done by some stenographer?

A. No, that was done by Mrs. Bridgeford.

Q. You saw her do it?

A. I didn't see her do it.

Q. She just told you she did it?

A. She usually does that work.

Q. And, of course, Mrs. Bridgeford, as a mem-

(Testimony of Charles J. Scollin.)

ber of the firm, does not spend her time digging into records and making up transcripts from old records? A. Not unless it is necessary.

Q. To save you the trouble of bringing the book into court, [56] you made up this transcript, is that correct?

A. That I couldn't say that either way.

Q. Well, you haven't reconverted all of your books into this type of transcript?

A. Active accounts, yes.

Q. But not closed accounts? A. No.

Q. You only do that if somebody wants a copy of such business they want?

A. That is right.

Mr. Gillen: I submit, if the Court please, this does not reflect the original entry or comply with the rule that your Honor has read. This is something prepared by some one else, not within the knowledge of this witness. It is hearsay as to this witness and of course definitely not kept in the regular course of business.

The Court: Objection overruled. Exhibit may be admitted in evidence as Exhibit 17.

Q. (By Mr. Thompson): Referring to Exhibit 17, will you please testify to the items of purchase made, the dates on which purchases were made, what type of insurance was purchased, and the dates on which payments were made.

Mr. Gillen: I offer the objection it is incompetent, irrelevant and immaterial and also that acceptance of this exhibit in evidence and reference

(Testimony of Charles J. Scollin.)

to it by this witness deprives [57] the defendant in this case of the right of examination of the original documents reflecting the original transactions made at the time they were consummated.

The Court: Objection will be overruled.

A. Our record indicates that May 1, 1945 personal property floater, our office No. 106.37 was issued, \$218.25. Second item is——

Q. What is a personal property floater?

A. Covers all personal property of any particular nature, including jewelry, household furniture, carpets, personal clothing, anything of a personal nature.

Q. Have you brought any other records which reflect what types of property were covered under personal property floater policy which is listed as the first item? A. I have some here.

(Discussion.)

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial what types of property are insured.

The Court: Objection will be overruled. You may answer the question. Do you understand the question?

A. In other words, I am to continue on reading from this and taking out these records.

(Question read.)

A. Yes.

Q. What does that record consist of? [58]

(Testimony of Charles J. Scollin.)

A. Consists of daily reports of our office.

Q. Will you produce it please? I show you Plaintiff's Exhibit 18 for identification. Does this constitute original records kept and maintained by your firm in the ordinary and customary course of the operation of its business? A. They do.

Q. Does Plaintiff's Exhibit 18 for identification refer to the first item on Plaintiff's Exhibit 17, designated May 1, 1945, personal property floater office No. 106.37? A. It does.

Q. Does it also constitute original record of your office relating to any other of the items on Plaintiff's Exhibit 17? A. It does.

Q. Which ones? A. 116.64.

Mr. Thompson: I offer Plaintiff's Exhibit 18 in evidence, your Honor.

Mr. Gillen: To which we offer an objection and I believe, may it please the Court, that your Honor should see the exhibit and I believe it will take some few moments to argue our objection on this with reference to the particular items.

(Jury and alternate jurors admonished and excused at 4:10 p.m.) [59]

(In the absence of the jury.)

Mr. Gillen: May Mr. Avakian present the argument?

Mr. Avakian: Your Honor, as Mr. Gillen stated, we have no objection to evidence as to the amount of insurance premiums paid. As a matter of fact,

I believe Exhibit 17 already contains that information.

Our objection to the receipt in evidence of the offered Exhibit 18 for identification is based on two grounds, and both of them involve a consideration of the legal basis for proving income on the net worth method. You will recall that in his opening statement Mr. Pike stated that in proving income on the net worth method, the government will establish the net worth at the beginning of each year and the net worth at the end of each year and that that increase in net worth would represent a figure which would be at least that amount of income received, unless it came from gifts, inheritance, or loans, and then he said in addition if they could show that certain expenditures were made during the course of the year, then the income would be even in excess of the amount of the increase in net worth.

Now the very heart of proving income on the so-called net worth expenditures method is this, that increase in net worth must be shown and then the prosecution may add to that expenditures of a personal or non-deductible nature, because any expenditures that are made which are deductible for tax [60] purposes would automatically wash out, because if you show the expenditures as income, then by the very nature where expenditure is deductible, the deduction offsets it, so that expenditure, if it is of a non-deductible nature, would not affect any income of the taxpayer and in net worth expenditure method the result of the computation

is not income on gross income but net income, so it becomes important then, in connection with any particular expenditure, for the government to show that that expenditure is not deductible under the income tax law before the amount of that expenditure can be added to the figures in net worth.

Now if your Honor follows me that far—and I hope that I am making myself clear, because this is a rather unusual point to come up in a court litigation—if your Honor follows me that far, then may I refer to the contents of this proposed Exhibit 18 for identification to explain our two-fold objection.

First of all, if the premium payment on this insurance represents a deductible payment, if the insurance is incurred in connection with the operation of a business, for example, so that the taxpayer would be entitled to deduce the insurance payment, then it would not fall in the category of expenditures that the prosecution may add to the net worth increase in computing net income for that year. Accordingly to have the amount of this insurance premium payment can be added to the taxpayer's [61] increase of net worth for the year 1945, the government must show that that payment was made for payment for insurance of a non-deductible or personal nature.

Now I understand from our off-the-record discussions here a moment ago with Mr. Thompson that he proposes to show, through introduction of this policy, which describes the property insured, that the property insured was not property used

in a business, but rather was personal property, that is, not business type of property. Now I think your Honor will recognize that the statement of an insurance policy as to the property insured does not establish the use that the taxpayer, or the insured, is making of that property. I do not care what the property may be—it may be an automobile, it may be a refrigerator, it may be a chair or a desk, it may be a fur coat—and bearing in mind the type of business of this taxpayer, it is conceivable even that type of property could be used in business—the important point is on the crucial question of whether the property covered by this policy was used in business or not. The listing in the policy of items of property insured throws no light on what use was being made of it. Now the prosecution, I take it, is trying to prove by this policy that the property insured was of a non-business nature. That is a matter of determination, not from the nature of the property, but from the use that is being made of it, and so I submit that we have nothing before us in this policy which would [62] establish this.

The Court: You look at some of those items and after looking at them, do you have any trouble in determining whether or not they are used in business or for personal adornment?

Mr. Avakian: Your Honor will remember in his opening statement Mr. Pike listed ten businesses—

The Court: I am just trying to follow your argument.

Mr. Avakian: I am trying to explain.

The Court: You said the statement of an insurance policy would not necessarily show whether the property insured was of a deductible nature or not.

Mr. Avakian: That is right.

The Court: Take a look at some items in that list and then do you have any trouble determining whether or not those items are deductible items?

Mr. Avakian: Let me explain my position. Here is a taxpayer who, according to Mr. Pike's opening statement, is engaged in ten different businesses, and I think we are not going too far from the record if we recognize for the moment that this was the type of business which involved entertaining in business and night clubs, etc.

The Court: We haven't any evidence as to the type of business. The Court is without any official knowledge as to the type of business of those businesses. [63]

Mr. Avakian: You have exactly hit the nail on the head, your Honor, and that illustrates why this is objectionable, because until they can show, for example, the fur coat or jewelry mentioned in this insurance policy, until they can show that this was not used in business, they have no right to bring into this case to build up as net income—

The Court (Interceding): Isn't that a matter of argument before the jury?

Mr. Avakian: No, your Honor, it is a matter of whether reasonable inference can be drawn from the fact a man insures a fur coat that he wasn't using that in his business.

The Court: Isn't it for the jury to determine

from the evidence in the case, including that, and they can determine whether or not that property should be used in the estimate of income of the defendant. Isn't it for the jury to determine those things from all the evidence?

Mr. Avakian: It is for the jury, of course, to interpret and apply admissible evidence, but it is for the Court to determine whether evidence is admissible, and I think your Honor is well aware of the ruling in connection with admissibility of circumstantial evidence. There must be a reasonable inference which can be drawn from circumstantial evidence to a material issue to the case.

The Court: That is the rule that will have to be applied [64] to warrant a jury in returning a verdict of guilty. Every link would have to be connected. That is for the jury.

Mr. Avakian: I do not make myself clear, your Honor. Before we leave the submission of the case to the jury, the Court has to rule whether the evidence being offered has sufficient materiality. Now if it is remote, it has no business in the evidence. If there is a reasonable inference which can be drawn from that evidence, then it is proper to submit it to the jury to determine whether they want to draw that inference. We are at the point of determining whether it could be reasonable to infer the mere fact that a man insures a fur coat means he is not using that fur coat in a business. Now that is the heart of my objection on the first objection, that is, that submission of this policy, showing the articles insured, does not reasonably support a conclusion

as to what use was being made of those articles. If it does not reasonably support the conclusion, then the Court has no business submitting that evidence to the jury. It is only if the jury could reasonably draw that conclusion it would be proper to submit it.

The second point of my objection is this—in this policy there are listed not only articles insured, but there is placed a value on each of those articles for the purpose of the insurance policy. You will recall that Mr. Pike made it clear in his opening statement that in making net worth computations [65] the government must use cost values and not market values of items that go into net worth. Now it would be highly improper then to submit to the jury evidence showing that a particular coat was insured for x dollars, because the jury might infer from that therefore x dollars figure should be used in this net worth computation, whereas the important factor Mr. Pike himself recognized, is not the value of it but the cost of it, what the taxpayer paid for it. Now it would be improper then to submit any value figure to the jury in connection with net worth computation, unless that is a cost figure, and furthermore, it is improper to submit to the jury any values of assets unless the time of acquisition of the asset is shown. Now here we have a policy taken out in May of 1945, insuring certain articles, say, for example, a fur coat. Now this policy does not show when that fur coat was acquired. If that fur coat was acquired before 1944, it has no place at all in this net worth net

worth computation. But the jury might infer from the fact that the prosecution has introduced evidence that this fur coat was insured on May 1, 1945 that that was purchased in 1945 and that would be a highly erroneous conclusion for the jury to draw and we should not expect a jury to be able to appreciate all these facts once they enter into net worth computation. We are having a trial that is going on apparently for many days and many witnesses are going to be presented and it would be prejudicial to the defense to put into this record [66] things which are not proper evidence under net worth computation and trust that the jury would properly understand the law of net worth computations and would know what to eliminate from the evidence in the record as immaterial. If it does not have probative value, then it should not be in this record.

Mr. Thompson: Your Honor, I think Mr. Avakian has made a very clear explanation of the materiality of the evidence we are now offering. He infers, however, or speculates, as can be no more than remote possibilities, that these insurance policies relate to business. In the first place, is there one insured here named as the Menlo Club, the B & R Smoke Shoppe, the 116 Club? Are any businesses named as insured in these policies? No, Helen Remmer and Elmer Remmer are named as the insured and when they insure property under a personal policy floater, they insured property which they claimed to own. I do not think there can be, as far as materiality of evidence is con-

cerned, any weight given to Mr. Avakian's suggestion that this evidence does not show, and I say most conclusively, that these are personal items of expenditure by Mr. Remmer during the year in question, which are entitled to be taken into consideration in making a net worth computation under the method which Mr. Avakian himself has explained.

We concede that the values given on the policy are not binding for the purposes of this case. Mr. Avakian is perfectly correct that it is the cost of the item and the time when [67] purchased which must be proved in a net worth case of this character, and it should be shown that the expenditure was made in one of the three years we have testified in this case. However, I might point out to your Honor that they are the ones that called for the original records. We tried to proceed in a way which would produce before the Court the material parts of this testimony and eliminate the immaterial parts. We now are in the position where we have to offer the original record in evidence. We think your Honor can properly instruct the jury at the time as to what portions of this record are material to be considered by the jury and what portions are not and we must, and it is very material to the government in this case, be permitted to introduce competent evidence which shows whether this expenditure by Mr. Remmer at the time in question was personal expenditure or business expenditure by a policy of this character, issued to Mr. Remmer and his wife personally, not

to one of his businesses, and things of that character should be admitted.

Mr. Avakian: May I say this, your Honor—Mr. Thompson first of all says the policy is in the name of Helen Remmer and Elmer Remmer and not the Menlo Club. There is nothing in this record so far, your Honor, which distinguishes any of those clubs from Helen and Elmer Remmer. We do have the opening statement from Mr. Pike that Mr. Remmer had either full or partial interest—

The Court (Interceding): I do not attach much weight to that remark because business property could be insured in the names of the defendant and his wife.

Mr. Avakian: Sure, and Mr. Thompson's statement is admission that the values shown in this policy are not proper evidence in this case, calls for conclusion because that is a very prejudicial matter if it does go to the jury and he has admitted it would be erroneous to put that in.

The Court: Well, I think that counsel will have an opportunity during the course of the trial or it probably will be shown just what these costs are. If it is not, the Court can take care of that question in the matter of instructions to the jury, instruct the jury not to regard those values placed as controlling, if that is the law, and at the conclusion of the trial counsel, I suppose, will submit instruction covering such points.

Mr. Avakian: I recognize all that, your Honor.

The Court: How else is the government going to be able to present its case?

Mr. Avakian: By showing through whatever evidence there may be what the use was of these particular articles.

The Court: If it is a fact that the defendant's wife purchased these items, valuable articles of personal wear, during any of these particular years, if [69] it is a fact, the government certainly is entitled to show it.

Mr. Avakian: Yes, if there is showing by this evidence when it was purchased or what was paid for it. I don't want to seem to belabor this point, but I want to make it as clear as I can that this is a highly important question and if the government is going to be able to get before the jury in this fashion evidence which it itself admits is immaterial and incorrect——

The Court (Interceding): Are those articles identified there? Could they be identified by reference to that exhibit?

Mr. Avakian: They just name one full length mink coat, for example. I submit that the government is entitled to show if they can by any competent evidence, what expenditures were made of a non-deductible nature.

The Court: Don't you think the government is entitled to show whether it is a fact that the defendant and his wife were possessed of such articles?

Mr. Avakian: That they owned these articles?

The Court: Yes.

Mr. Avakian: That would be immaterial unless

connected with evidence showing it is used in a non-deductible way.

The Court: We cannot have the whole case put in at one time. [70]

Mr. Avakian: I appreciate that.

The Court: The objection will be overruled. The exhibit will be admitted in evidence. [71]

Friday, November 30, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

The Court: Now at the conclusion of yesterday's session, the Court determined to admit in evidence Exhibit 18, but for the present the valuation figures contained in such exhibit are not to be considered by the jury. I say for the present. They may or may not later be considered. We haven't decided that question at this time.

Mr. Thompson: Your Honor, for the purposes of the record, I take it your present statement is a ruling on the objection which was made yesterday afternoon which was decided in the absence of the jury?

The Court: That's right. Are you ready to proceed?

MR. SCOLLIN

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Scollin, at the recess yesterday we were to consider Exhibit 17, statement of Mr. Remmer's account with your firm, in connection with Plaintiff's Exhibit 18, which you testified, I believe, was the original record of your office relating to certain items on Exhibit 17. Will you state again what items on Exhibit 17 are covered by Exhibit 18?

A. Personal property floater, our office 106.37, effective May 1, 1945, covering personal property in that contract. [72]

Q. And the first item at the top of Exhibit 17, May 1, 1945, personal property floater, office 106.37, debit \$218.25, that is one of the items covered by that policy?

A. That is right.

Q. Also the second item on Exhibit 17, June 21, 1945, personal property floater additional, debit \$24.56, is that also covered by Exhibit 18?

A. That is right.

Q. And also item dated May 1, 1946, personal property floater, debit \$248.25, is that covered by Exhibit 18?

A. That is the renewal premium, \$248.25. That is right.

Q. I refer also to the item dated November 1, 1946, personal property floater additional, \$336.00?

A. That would be additional premium, yes.

(Testimony of Charles J. Scollin.)

Q. \$336.00?

A. It doesn't seem to be on this contract.

Q. That is not part of policy Exhibit 18? Was that renewal of that policy?

A. That figure does not appear to be on the contract.

Q. I would like to read a portion of Exhibit 18, your Honor. As testified, this is a personal property floater insurance policy insured by the Home Insurance Company, New York, to Helen Remmer, with additional endorsements as testified. The items insured are as follows: one full length mink coat; one four Russian sable neckpiece; one coat full lynx collar; one [73] full length silver fox coat; one pair of diamond and platinum ear screws, 21½ cts. each; two fur foxes; one full length mink collar; one star sapphire and diamond ring; one diamond and platinum wrist watch, 100 diamonds; one fancy diamond ring; one diamond ¾ ct. two diamonds 1/5 ct., small diamonds; one diamond and platinum pendant watch open; one platinum bracelet, 96 diamonds, 64 emeralds; one diamond ring; one diamond approximately 4½ cts., 20 diamonds, six fancy diamonds; one fancy diamond ring; one diamond 1½ ct. ring 10 baguettes, 12 diamonds.

Mr. Scollin, referring again to Exhibit 17 and the item under date September 3, 1945, public liability, office 108.02, debit \$14.00, do you know what that insurance coverage was for?

A. That covers Mr. Remmer's personal liability, including his home. It is a liability contract.

(Testimony of Charles J. Scollin.)

Q. The item September 2, 1945, plate glass, office No. 108.01, debit \$7.50, do you know what that insurance covers?

A. That covers residence plate glass. All of the plate glass in his personal residence.

Q. The next item, August 17, 1945, fire on dwelling, \$6500, three years, office No. 107.65, debit \$54.25, do you know what that item covers?

A. That covers fire insurance in the amount of \$6500 for three years.

Q. Do you know where that residence was located?

A. Not from that record I couldn't say. I believe it is [74] Orinda.

Q. Where is Orinda?

A. I believe in Contra Costa County.

Q. California? A. California.

Q. Under date of October 26, 1945, comprehensive liability, office 1.75, debit \$25, do you know what that insurance coverage was?

A. That would be also his comprehensive personal liability policy.

Q. Date May 1, 1946, personal property floater, office 116.64, debit \$248.25. Do you know what that insurance coverage was?

A. That would be personal property floater covering his personal effects, such as you read there, jewelry, furs, etc.

Q. That is renewal of the same policy, Exhibit 18, is that correct?

Mr. Gillen: What is the date of that?

(Testimony of Charles J. Scollin.)

Mr. Thompson: This item is May 1, 1946.

A. That is a renewal premium.

Q. Of Exhibit 18?

A. Yes. It would be renewal contract of that.

Q. Is it a renewal of Exhibit 18?

A. That's right, it would be.

Q. And the item November 1, 1946, personal property floater additional, \$336.00? [75]

A. That would be a renewal premium under this contract.

Q. By this contract do you mean Exhibit 18?

A. No, sir, this contract here.

Q. Mr. Scollin, I show you Plaintiff's Exhibit 19 for identification, and state whether or not that is a record of your firm which is kept and maintained in the usual customary course of the business of that firm? A. It is.

Q. And is it a part of the business of your firm to keep records of that character relative to the issuance of insurance policies?

A. It is.

Mr. Thompson: I offer in evidence Exhibit 19 for identification.

Mr. Gillen: May it please the Court, the defendant makes the same objections to this Exhibit 19 as was advanced yesterday in connection with the introduction of Exhibit 18, and we make the additional objection that this Exhibit 19 shows an insurance policy issued exclusively to Helen L. Remmer, and for that reason, of course, we do not think that it could possibly be construed as binding

(Testimony of Charles J. Scollin.)

upon the defendant in this case, because Helen L. Remmer as the insured is the only one that will be an insurable interest and the only one that will be recognized by the insurance company, and there is no evidence that the premium for this was paid by any one other than the person [76] named as the insured in the policy. I am very happy to pass the exhibit up and let your Honor observe that it is exclusively in the name of Helen Remmer.

Mr. Thompson: If the Court please, exhibits are already in evidence showing that during the year in question when the policy was issued Mr. Remmer and his wife, Helen Remmer, filed federal income tax returns on the community property basis, in which income reported by himself was reported as community property and divided with his wife, Helen Remmer, for the purpose of computing the tax alleged to be due.

Mr. Gillen: Of course, that does not affect this policy. This policy might be on matters that belong exclusively to Mrs. Remmer. It might be separate property.

The Court: Objection overruled. The exhibit will be admitted in evidence.

Q. Mr. Scollin, by referring to Exhibit 19, are you able to testify what type of insurance and the character of the coverage is represented by the item of November 1, 1946, debit \$336?

Mr. Gillen: We encountered the same situation in regard to the schedule in that exhibit as the other.

(Testimony of Charles J. Scollin.)

The Court: We will have the same understanding in regard to the schedule that seems to be in Exhibit 19 as in regard to Exhibit 18.

Mr. Thompson: Yes.

Mr. Pike: Your Honor, we understand, of course, if [77] the tender is made, it will be for the entire document, subject only to that reservation for the present.

The Court: That is right.

(Question read.)

A. This is a personal property floater unscheduled, effective November 1, 1946, for a period of three years for a premium of \$336.

Q. What do you mean by unscheduled, Mr. Scollin?

A. That excludes all jewelry or furs in the policy.

Q. Covers every other character of personal property owned by the insured? A. It does.

Q. Mr. Scollin, by referring to Exhibit 17, will you testify as to the dates on which payments were made on account of Mr. Remmer and the amounts of payments?

A. On September 30, 1945, a payment was made of \$298.06, which paid premiums of \$218.25, \$24.56, and \$55.25. On November 27th payment was made in the amount of—

Q. What year was that please?

A. That would still be 1945—of \$46.50, which paid \$14.00, \$7.50, and \$25.00. On July 5, 1946, payment was made in the amount of \$248.25, which

(Testimony of Charles J. Scollin.)

paid premium under personal property floater of \$248.25. On December 31, 1946, payment was made in the amount of \$365.39, which paid a premium of \$336.00 and \$29.30.

Mr. Thompson: You may cross-examine. [78]

Cross-Examination

By Mr. Gillen:

Q. Mr. Scollin, do you have in your hand or in your possession your subpoena?

A. I believe it is on the exhibit, I believe it is 16.

Mr. Pike: It was produced yesterday and I believe it was here on our counsel table yesterday afternoon.

Q. Now I note in this subpoena that you were directed, or at least your firm was directed, to appear and bring with you data referring to payments made on insurance premiums November 27, 1945, and September 30, 1946, and July 5, 1946, and any other records of insurance payments on residence or other personal property of Elmer F. Remmer or Mrs. Helen L. Remmer during the years 1944 to 1946 inclusive. Do you wish to verify that by looking at it, or is that your recollection?

A. That is my recollection, reading that.

Mr. Gillen: Do you wish to verify that, Mr. Pike?

Q. Now I show you the prosecution's Exhibit 18, which we will call the daily—the insurance people call daily—a copy of the daily. I will hand you this exhibit and ask you if, from looking at that exhibit,

(Testimony of Charles J. Scollin.)

you can tell us whether that daily indicates the original policy was renewal policy of an earlier policy?

A. This is a daily report of an original policy that was issued May 1, 1945, for a period of one year.

Q. Is there anything indicated that that was the first time [79] the property named therein was insured, either through your firm or elsewhere?

A. Will you repeat that again?

Q. Is there anything in that exhibit that indicates to you that was the first time that that property designated therein or referred to therein was insured?

A. It appears to be a renewal of a former policy.

Q. The date of that policy is what?

A. May 1, 1945, to May 1, 1946.

Q. It appears to be renewal of a policy that had been in existence prior to May 1, 1945, is that correct?

A. That is right.

Q. And you don't know how many renewals prior to that on that same property was issued and effective for a 12-month period?

A. Not from this contract we couldn't determine that.

Q. You were not asked or directed in the subpoena to do any more than bring with you records from 1944 to 1946, inclusive?

A. That is my understanding.

Q. And so you don't know what your records reflect as to whether or not that same property may

(Testimony of Charles J. Scollin.)

have been covered by a 12-month period—and I am talking about jewels and furs referred to in that particular floater policy—you don't know how many years that same property had been insured?

A. No.

Q. It might have been insured since the 30's, is that correct? [80] A. It could possibly.

Q. Now that particular floater policy which covers furs and jewelry, those policies are issued for 12-month periods, are they not? A. Normally.

Q. And then there are other types of policies that are issued for three-year periods?

A. That is right.

Q. And I believe that the prosecution's Exhibit 19 reflects a policy issued for a three-year period, is that correct? Would you care to look at it?

A. That is right, this is a three-year contract, November 1, 1946, to November 1, 1949, personal property floater.

Q. That policy covers personal property of a character other than furs and jewels, is that correct? A. That is correct.

Q. That is why you call it an unscheduled policy? A. That is right.

Q. That covers such things as silverware and linens or furniture, antiques, etc.?

A. That is correct.

Q. Probably ordinary clothing?

A. Clothing also.

Q. And then as I recollect, there are policies in

(Testimony of Charles J. Scollin.)

existence covering public liability, plate glass and fire on dwelling, [81] is that correct?

A. That is correct.

Q. Now public liability means, does it not, the insured person's obligations to some one who might be injured on their premises?

A. That is correct.

Q. Or who might be injured by their property or by themselves?

A. That is right.

Q. And plate glass insurance, of course, covers plate glass broken by storm or other accident, or something of that sort?

A. That's right, correct.

Q. And of course fire on dwelling, I notice here is a \$6500 policy for three years, is that correct?

A. That is correct.

Q. That is a rather modest policy for a dwelling house, is it not?

A. Depending on the valuation of the house.

Q. I say it is rather modest. You encounter higher policies on dwelling houses, isn't that right?

A. That is correct.

Q. Now your records reflect—and if the prosecution's Exhibit 17 will assist you, with the clerk's permission I will hand it to you—your records reflect who paid the premiums on those policies and in what manner the premiums were paid?

A. This record here indicates it was by cash and on those [82] dates I mentioned previously.

Q. Well, we have the dates, of course, set forth, and you have testified to them, but you say that

(Testimony of Charles J. Scollin.)

the transcript that was made up for you by your office indicates that the payments were made by cash? A. It could be check.

Q. Check or cash?

A. Or cash, that's right.

Q. In other words, just reflects you received money in whatever form for those premiums?

A. That is right.

Q. And then the other part of my question was, does it indicate who made the payments?

A. No, it does not.

Q. The payments may have been made by some one other than Mr. Remmer?

A. That is right. Our records just indicate that it was check or cash.

Q. Now as to the prosecution's Exhibit 19 that reflects the policy issued, a floater policy and personal property, issued exclusively to Helen L. Remmer, does it not? A. It does.

Q. She is the sole insured in that policy?

A. Correct.

Q. And she is the only person whose claim would be recognized [83] by the company under those circumstances, is that true? A. That is true.

Mr. Gillen: I think that is all, thank you.

Redirect Examination

By Mr. Thompson:

Q. Mr. Gillen, calling your attention to the item August 17, 1945, fire on dwelling, \$6500, three years.

(Testimony of Charles J. Scollin.)

Do you have any knowledge, or any way of telling from your record, whether that is the only fire insurance policy coverage issued for that particular dwelling?

A. According to our records, that is the only policy issued on that dwelling.

Q. By our company? A. By our office.

Q. Do your records show whether fire insurance coverage had been obtained for that dwelling from any other company? A. I would say no.

Q. They don't show?

A. They don't show. We wouldn't know whether any other policy was issued through another source.

Mr. Thompson: That's all.

Recross-Examination

By Mr. Gillen:

Q. Isn't it a fact that when fire insurance is applied for, the applicant is asked what other insurance covers that particular property, isn't that a fact?

A. In some cases it is so, to establish a value, so that the [84] agent handling, or the broker handling, the insurance will not be criticized for underinsuring a piece of property.

Q. Is there anything that reflects what was done in this case in the records?

A. I would say no.

Q. Isn't it a fact that you usually make it your concern whether or not the same piece of property is insured several times by other company?

(Testimony of Charles J. Scollin.)

A. If it is a piece of merchandise business we would.

Q. Well, it is a fact, is it not, that within your practice and the custom of the insurance business, that as to dwelling houses, as a rule, there is only one policy on dwelling houses?

A. That is normal.

Q. And on business property there may be re-insurers, that is, company may take portions of the risk?

A. That is correct, they take a percentage.

Q. There may be four of five company?

A. Yes, are participating.

Q. Participating in one large building, like an office building, merchandise company or factory?

A. That is correct.

Mr. Gillen: I think that is all.

Mr. Thompson: That is all, Mr. Scollin.

(Witness excused.) [85]

(Discussion between counsel.)

MRS. AGNES BADOBINATZ

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you please state your name?

A. Mrs. Agnes Badobinatx.

Q. Where do you live?

(Testimony of Mrs. Agnes Badobinatz.)

A. 1506 Vageden Avenue, Fresno.

Q. Are you married? A. I am a widow.

Q. What was your husband's name?

A. Peter Raymond Badobinatz.

Q. Sometimes known in business as P. R. Badobinatz? A. P. R. Badobinatz.

Q. When did he die?

A. January, 1950, January 11th.

Q. January 11, 1950? A. Yes.

Q. Prior to his death where did you and your husband reside?

A. 1505 Vageden Avenue, Fresno.

Q. For how many years did you reside there?

A. At the same address or in Fresno?

Q. No, in Fresno. A. Since 1937.

Q. Do you know with what bank your husband conducted his business [86] usually during his lifetime? A. In Fresno?

Q. Yes.

A. The Bank of America, the main branch.

Q. You know he did do business with the Bank of America in Fresno, is that correct?

A. Yes.

Q. In the month of February, 1947, did you have a conversation with your husband relating to an obligation of his? A. Yes.

Mr. Gillen: Just a moment. It slipped by me. This calls for a conversation between husband and wife at a date later than the time boundary in the indictment.

The Court: We have not reached that point. All

(Testimony of Mrs. Agnes Badobinatz.)

we have there was a conversation; we don't know what it is.

Mr. Gillen: Of course, it is incompetent, immaterial and irrelevant what these people talked about in 1947.

Q. Mrs. Badobinatz, where did that conversation take place?

Mr. Gillen: I think that would be incompetent, irrelevant and immaterial, and I will offer that objection.

The Court: Objection will be overruled.

Q. Did you answer the question?

A. I did.

Q. I didn't hear it. A. At our home. [87]

Q. At your home in Fresno? A. Yes.

Q. Who, if any one, other than yourself and your husband, was present at that time?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Nobody was present.

Q. What was the conversation that you had at that time?

Mr. Gillen: Now, of course, first this is asking for hearsay testimony that couldn't possibly be binding on the defendant in this case.

The Court: Objection sustained.

Mr. Thompson: Your Honor, I would like to be heard before you rule, if I may, and I respectfully request that you withdraw the ruling.

(Testimony of Mrs. Agnes Badobinatz.)

The Court: Very well, we will excuse the jury.

(Jury and alternate jurors admonished and excused from the courtroom at 11:05 a.m.)

(In the absence of the jury.)

The Court: Now.

Mr. Thompson: If the Court please, I will state in the absence of the jury that we anticipate that this witness will testify that on the occasion in question she had a conversation with her husband—

Mr. Gillen: I wonder if I might interrupt counsel, for this reason—if counsel is going to state—of course, the press is present—this is a public trial, the subject of that conversation would undoubtedly be talked about by the press and be published. I would like to make this observation before counsel goes farther—I can't see for the life of me, as stated before, how counsel expects to get conversation occurring between husband and wife. The husband is now deceased. How does he expect to get into this case a conversation which, first of all, is a confidential and privileged conversation? Secondly, is sealed forever by reason of the fact that the person who could waive the privilege and confidential relationship of that conversation is deceased, and I am not familiar with your so-called dead man's statute—we have the statute in California and I know your Nevada law is based largely upon the original code in California. I assume that the same statute is in existence here. And finally, of course, Mr. Remmer was not present at this conversation,

(Testimony of Mrs. Agnes Badobinatz.)

that has been established. No one was present but this husband and wife and it would be calling for the grossest and rankest kind of hearsay.

The Court: I would like to hear from you on the hearsay question.

Mr. Thompson: Your Honor, I would like to suggest to counsel there is a well-recognized exception to the hearsay rule known as declaration against interest which goes into [89] effect when the person who made the statement is deceased or otherwise unavailable as a witness. When a statement is made by a person deceased or otherwise unavailable, and in this case we have proved he is deceased, which is against his pecuniary interest, such as admission of indebtedness, it is admissible in any trial if it is relevant and material. Now in this instance we are dealing with the payment of an obligation which we expect to take into consideration in the net worth computation of Mr. Remmer's income. We expect to corroborate the circumstances of that obligation by other evidence. I am saying that generally, your Honor—

The Court: Have you any authority here on this question of declaration against interest? I know, of course, that is an exception against the hearsay rule. I would like to hear if you have anything that would apply to that situation. Let us hear the authority.

Mr. Gillen: It wouldn't be binding upon Mr. Remmer, who was not present.

Mr. Thompson: Mr. Gillen confuses—I would

(Testimony of Mrs. Agnes Badobinatz.)

like to read from 31 Corpus Juris Secundum, 954: (Reads) That is the heading in black print. The balance of the text is as follows: (Reads page 954) Then there is a lengthy discussion of the requirement, which I will be glad to read if the Court wishes. [90]

The Court: I can't see how the dead man's rule would have any bearing on this question. Just discuss that part of it for a moment. It isn't to be used in any way, shape or form against a deceased person. Now that, I think, is the purpose of the dead man's rule. That part I am not so much concerned with. Have you anything further to say on the question?

Mr. Thompson: Your Honor, with regard to the dead man's rule, I think it is well settled, if your Honor is referring to the Nevada statute——

The Court: Yes.

Mr. Thompson: ——that the dead man's rule only applies to transactions between parties to the litigation and that was decided——

The Court: Well, where one of the parties is deceased.

Mr. Thompson: That is right. Now the gentleman here has no part in this instant litigation and one of the requirements of the declaration against interest rule is that the person who made the statement, be dead or otherwise unavailable, so that he, himself, can not be presented as a witness to the fact. If under those circumstances we can prove a statement made by him which is against his declara-

(Testimony of Mrs. Agnes Badobinatz.)

tory interest and therefore would presumably be an accurate, honest, truthful statement of the facts, we are entitled to do that, and as the quotation points out that may be, as it clearly is, a weaker form of [91] evidence than would be the presence of Mr. Badobinatz if he hadn't so unfortunately died, but nevertheless it is competent and admissible evidence under these circumstances.

Mr. Avakian: Your Honor, the provision to which we refer is a peculiar provision in all of our States and also the rule in federal courts and in Nevada the law reads as follows: Section 8971—I am going to read the entire section, which is short, and then emphasize the portion which I believe applies here:

“A husband can not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage.”

The remaining sentence is not material, but that part I emphasized in reading is the important thing, your Honor. There are two aspects of communications between husband and wife. One aspect which does not apply here is——

The Court (Interceding): Read the complete sentence. (Mr. Avakian reads.) Now the purpose

(Testimony of Mrs. Agnes Badobinatz.)

of that provision, beginning with, "nor can either," is to insure to a husband and wife that during their marriage they can speak with complete confidence to each other and rest assured that at no time, [92] whether during marriage or afterwards, can the other party to the marriage be examined as to any of those communications. The purpose of it is the social policy of encouraging free communications between husband and wife. We did not expect this to come up or we could have prepared case authorities, but I think the statute is clear:

"* * * nor can either, during the marriage or afterwards, be, without the consent of the other, be examined as to any communication made by one to the other during marriage."

The Court: Have you any federal cases?

Mr. Avakian: There are, but I don't have them at hand.

The Court: Would that provision govern a federal court?

Mr. Thompson: I think the rule of evidence in criminal cases in federal court is generally conceded to be the best common law rule of evidence as determined by the courts at the present time. I do not think there is any definite statutory rule of evidence, but I would like to suggest to your Honor that if Mr. Remmer who, as far as I know, is a stranger to the marriage between Mr. and Mrs. Badobinatz, can claim the privilege of Mr. Badobinatz with relation to confidential communication

(Testimony of Mrs. Agnes Badobinatz.)

between husband and wife, this will be the first instance in which that claim was ever successfully made. A stranger to the marriage can not claim such a privilege, otherwise whenever you had a married witness and produced them, you would have [93] to produce the husband or wife to get their consent to testify. It is a personal privilege which only the husband or wife can assert.

The Court: I can see this picture coming up in the trial of any case. The husband is on the witness stand. He is speaking about some business matter but he happened to mention the matter to his wife day before yesterday and if counsel on the other side could bring that out by cross-examination, then it would be stricken.

Mr. Avakian: No, your Honor, the section says --- the witness can not be questioned as to communication between husband and wife. They can't question the husband as to what he told his wife, but they can question him as to the transaction.

The Court: Objection overruled.

Mr. Avakian: May we ask your Honor to defer ruling until we can provide federal authorities?

The Court: I overruled the objection now and I think your argument to be in the nature of an admission as to the soundness of the text which was just read on the question of declaration against interest.

Mr. Avakian: We won't concede that, your Honor.

The Court: Your only offer is on that point.

(Testimony of Mrs. Agnes Badobinatz.)

Mr. Avakian: We made the argument on one point and are making it now on another. [94]

The Court: Objection is overruled. Now the question is we don't want any conversation to go before the jury which wouldn't come within the provisions of this text, so I think we had better hear the conversation now in the absence of the jury, so we may know whether it is a declaration of interest.

Mr. Avakian: May we approach the bench and have the conversation given to your Honor?

The Court: I don't see any reason for that.

Mr. Avakian: Well, the papers——

The Court: I don't believe the gentlemen of the press here would publish matter which was not admitted in evidence.

Mr. Gillen: There was something published in our papers this morning that wasn't admitted in evidence.

The Court: Well, we are going to try this case without regard to the presence of the press. This is a public trial, so we will proceed.

Q. Mrs. Badobinatz, will you state at this time what the conversation was that you had with your husband in February, 1947?

Mr. Gillen: I am going to object to any testimony being taken by the Court outside the hearing of the jury. It is my understanding that your Honor wanted some statement by counsel.

The Court: I want to hear the conversation so

(Testimony of Mrs. Agnes Badobinatz.)

I can [95] determine for myself whether it is a declaration against interest.

Mr. Gillen: Is this witness going to testify?

The Court: She is going to give me the conversation. You may proceed.

(Question read.)

A. He said he was going to the bank to get a cashier's check to send to Mr. Remmer of five thousand dollars for money that he had borrowed.

Mr. Thompson: That's it.

The Court: So call the jury in.

Mr. Gillen: May we have a moment's recess before the jury is called in?

(5 minute recess taken at 11:20 a.m.)

11:30 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MRS. BADOBINATZ

resumes the witness stand.

(Last question read.)

Mr. Gillen: We renew the objection on all the grounds previously stated and believe we have some further authorities found during the recess.

The Court: Objection overruled. Proceed.

Mr. Gillen: Does your Honor care to hear the authority [96] that we have?

(Testimony of Mrs. Agnes Badobinatz.)

The Court: Proceed. Objection overruled.

Mr. Gillen: Your Honor asked us for some federal authority.

The Court: Objection overruled.

Mr. Gillen: Let the record show that we have federal authority.

The Court: Proceed.

Q. (Read): What was the conversation you had at that time?

A. Mr. Badobinatz said that he had to go to the bank to get a cashier's check for five thousand dollars to pay Mr. Remmer the money that he had borrowed.

Mr. Thompson: You may cross-examine.

Mr. Gillen: At this time, may it please the Court, we move to strike the question and answer and assign asking of the question as misconduct and press our motion—I amuse counsel, but I am very earnest——

The Court: The motion is denied. Let us proceed.

Mr. Gillen: The motion is denied before I state my grounds? I am about to state my grounds.

The Court: I thought you moved to set aside on all grounds contained in your objection.

Mr. Gillen: There is some additional.

The Court: I wouldn't entertain any other grounds except the ones raised in your [97] objection.

Mr. Gillen: You won't entertain any other grounds? I would like to cite your Honor a case.

(Testimony of Mrs. Agnes Badobinatz.)

The Court: What are your grounds? Go ahead and state them.

Mr. Gillen: Well, in the first place, it is hearsay as to the defendant Remmer, No. 1. In the second place, it is privileged communication between husband and wife, No. 2.

The Court: I am asking you to state grounds other than those raised in the objection.

Mr. Gillen: All right. My new grounds are, first of all, there is no foundation laid to establish here when the indebtedness to Mr. Remmer was incurred. If it was incurred in 1920, 1925, 1930, it would be incompetent, irrelevant and immaterial, and moreover, we would like your Honor to consider, in connection with your ruling, the case of *Frazier vs. U. S.*, decided October 3, 1944, found in 145 Federal Reporter (2), at page 139, where privileged communication between husband and wife is recognized. I would like to add the further ground that the answer given here is not a so-called declaration against interest, as recognized in law.

The Court: Motion is denied.

Mr. Gillen: Would your Honor consider the fact that it would be incompetent, irrelevant and immaterial?

The Court: The Court has ruled. The motion is denied.

Mr. Gillen: I am calling another matter to your attention. [98]

The Court: I don't want to hear any more argument on a matter I have already ruled.

Mr. Gillen: No questions.

Mr. Thompson: That is all.

The Court: I hear no reason why you could not be excused. You may be excused.

EUGENE F. MURPHY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Eugene F. Murphy.

Q. Where do you live?

A. 649 Brookwood Road, Oakland.

Q. Are you acquainted with the defendant, Elmer F. Remmer?

A. I am. I knew him since he was a boy. We were boys together in Oakland.

Q. And since the year 1934 where, do you know, has Mr. Remmer lived?

Mr. Gillen: I think that is calling for his opinion?

The Court: Let me have the question.

(Question read.)

Mr. Gillen: I withdraw the objection.

A. I knew he was in Cal-Neva and at San Francisco, back and forth. I wouldn't know where his residence was. [99]

Q. What is your business?

A. I am retired police inspector of the City of

(Testimony of Eugene F. Murphy.)

Oakland. Now outside representative of Billings Furniture Company, 14th and Clay, Oakland, California.

Q. When did you retire as police inspector for the City of Oakland?

A. My retirement took effect legally March 1, 1946, but I had overtime and the last day I worked was January 30, 1946.

Q. During the year 1946 did you have a conversation with Mr. Remmer relating to a contribution by him? A. I did.

Q. Where did that conversation take place?

A. I phoned him. I got his telephone number. Some way I obtained his telephone number in San Francisco. I phoned his office and I phoned from my home and I talked to Mr. Remmer. That was in April and I told him——

Q. April of 1946?

A. Yes, sir. I told him what the nature of the call was. I told him that the County Board of Supervisors were remodernizing the charter, that they asked me would I help, which Judge Kennedy took an active part, and being a friend of mine, asked me would I help the Board of Supervisors. I told him I would. So Maundrell, the chairman at the time, and Judge Kennedy and Harry Bartel, the present chairman of the Board, had a meeting and talked over the coming election, so they asked again [100] would I work with the finances with Bartel and I said yes, so I talked to Mr. Remmer what they were doing about having the charter

(Testimony of Eugene F. Murphy.)

modernized, had to modernize the charter so the salaries of supervisors and others could be regulated, etc.—that couldn't be changed unless the charter was changed—so I asked him if he wanted to give a little contribution to it. He said yes, he would send over \$200, so shortly after I received a check from Hal Maundrell for \$200 and I endorsed that check, which several others were made out in my name, I endorsed it—I don't know whether I gave it to Bartel, but we put all the money we received, I think around three thousand dollars, into the Bank of Commerce at 16th and San Pablo Avenue in Oakland, and the only one who could sign those checks was the chairman of the Board of Supervisors and myself, but some checks maybe come in that we cashed for petty cash, like for stamps, there were 75 thousand postal cards sent out and maybe 30,000 letters and they had volunteer workers they paid expenses of, but most of our checks, and I am pretty sure this check here, was put in that bank account.

Q. The conversation which you have related you had by telephone with Mr. Remmer in April of 1946, is that correct? A. That is true.

Q. Did you ever talk to Mr. Remmer personally, other than by telephone, concerning this contribution? A. No. [101]

Q. Will you state again what you told him the purpose of the contribution was?

A. Here is what I told him—modernization of charter of Alameda County. I told him they were

(Testimony of Eugene F. Murphy.)

changing it so they could change the salaries of the county employees. That included the supervisors and the supervisors were the ones that brought this amendment up to the people to vote on it.

Q. You also stated, I believe, that there was an election in the offing? A. Yes, there was.

Q. And was any of the money used, so far as you know, in connection with the campaign expenses of any candidates for office?

Mr. Gillen: I think this question has been asked and answered. The gentleman said what he was working on—to modernize the city charter so that the salaries of the city employees could be brought up to date.

The Court: I think you are correct.

Mr. Thompson: You may cross-examine.

Mr. Gillen: I think there is no cross-examination.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 11:45.) [102]

Afternoon Session, November 30, 1951, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MAX SILVERMAN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Max Silverman.

Q. Where do you live?

A. 717 Kansas Street, San Francisco, California.

Q. How long have you resided in San Francisco? A. Fifteen years.

Q. At one time did you own a business in San Francisco known as the 186 Club and Day-Night Cigar and Liquor Store? A. Yes, sir.

Q. Did you dispose of that business?

A. I did.

Q. On what date?

A. It was on or about March 1, 1943.

Q. Where did the transaction relating to the sale of that business take place?

A. Originally took place in my home.

Q. And that was around the first of March, 1943? A. Around about that time. [103]

(Testimony of Max Silverman.)

Q. What did the business known as the 186 Club consist of?

A. Consisted as a cigar and liquor store, magazines, and a club room, incorporated club room.

Q. Where were the premises located?

A. Located at 26 Eddy Street.

Q. In San Francisco, California?

A. San Francisco, California.

Q. And what character of business was carried on in the incorporated club room?

A. A card room.

Q. You mean that is a place where people played card games?

A. Played card games, right.

Q. What types of games?

A. Well, draw poker, called panguingue.

Q. Who came to see you at your home around the first of March, 1943, regarding the purchase of those premises? A. Mr. Willie Kyne.

Q. And did you and he have a discussion at that time relating to the purchase of this business by Mr. Kyne? A. Yes, sir, we did.

Q. Subsequent to that, did you and Mr. Kyne meet in any attorney's office to complete the transaction? A. We did.

Q. And what was the name of the attorney?

A. Joe Haughey.

Q. Do you recall where his office was [104] located? A. Phelan Building.

Q. In San Francisco? A. San Francisco.

Q. Who was present at that time?

(Testimony of Max Silverman.)

A. Mr. Kyne, Mr. Haughey, myself, and my attorney, Mr. Blackfield.

Q. At that time did you receive from any any money on account of the purchase price for this business?

Mr. Gillen: I am going to have to offer an objection to all this line of questioning. It is grossly hearsay as to the defendant in this case, not binding upon him, the actions of some man and Mr. Kyne and an attorney.

The Court: The objection will be overruled but, of course, if it is not connected up, you may move to strike it. You may answer the question.

A. I did.

Q. How much money did you receive from whom?

A. I received one thousand dollars as a deposit.

Q. Who paid you that money?

A. Mr. Kyne.

Q. And in what form was the payment made?

A. In cash.

Q. Were arrangements made at that time for the establishment of an escrow?

Mr. Gillen: Objected to as leading and suggestive, also [105] hearsay.

The Court: Objection overruled. You may answer the question.

A. Yes.

Q. And was an escrow established in connection with the sale by you to William Kyne of the prem-

(Testimony of Max Silverman.)

ises known as 186 Club and the Day-Night Cigar Store? A. Yes, sir.

Q. And where was the escrow established?

A. Bank of America, Day and Night Branch, San Francisco.

Q. Did you subsequently receive the full purchase price for those two businesses from the escrow department of the Bank of America?

A. Yes, sir, I did.

Q. Do you recall on or about what date you received the balance of the money?

Mr. Gillen: May it be understood, your Honor, that all of this line of testimony which your Honor permits to come up, is subject to the objection that it is hearsay?

The Court: If it is not connected, you may move to strike it.

Mr. Thompson: That is a satisfactory understanding, your Honor.

(Question read.)

A. Well, approximately in the month of March, latter part of [106] March.

Q. Of 1943? A. Yes, sir.

Q. How much did you receive?

A. Fifteen thousand dollars from the escrow department and six thousand and sixty-seven dollars for the inventory. The escrow money was paid to me by check. The inventory money was paid by cash by Mr. William Kyne.

Q. As I understand it, you received the sum of

(Testimony of Max Silverman.)

15 thousand dollars from the escrow department some time in the month of March, as you recall, 1943? A. As I recall in 1943, right.

Q. And when did you receive the sum of \$6067 in cash from Mr. William Kyne?

A. I don't know the exact date, but it should have been the early part of March, after the inventory—must have been the 1st or 2nd of March.

Q. And what do you mean by inventory?

A. The inventory, I mean by that that you take an inventory of stock, such as liquors, cigars, cigarettes, candies, magazines, etc.

Q. They were the stock-in-trade of those businesses? A. Yes, sir.

Q. That inventory was taken and then you received \$6067 as the purchase price for the inventory? [107] A. That's right.

Q. The sum of \$15,000 received from the escrow department of the bank and the one thousand dollars received by you in cash as a down payment in Mr. Haughey's office, was in payment for what?

A. For the lease, good-will, fixtures, licenses.

Q. Do you recall, Mr. Silverman, whether there was an allocation of the 16 thousand dollars purchase price for the premises, good-will, licenses and the like, between those various items? Do you understand what I mean?

A. I don't understand.

Q. Do you understand whether any particular portion of that total sum was in payment for

(Testimony of Max Silverman.)

licenses, another portion in payment for the lease, another portion in payment for the good will?

Mr. Gillen: May that be answered yes or no, your Honor?

The Court: Yes, answer it yes or no.

A. Yes.

Q. And how was the total price of 16 thousand dollars allocated between the various items?

Mr. Gillen: To which we offer an objection, first of all, it is hearsay, and secondly, the written agreement is the best evidence of what the terms of the sale was, in the event that your Honor does not act upon the hearsay objection.

Mr. Thompson: If he recalls it, your [108] Honor.

The Court: You may answer the question. The objection is overruled.

Mr. Gillen: If there is an existing contract, that is, of course, always the best evidence.

The Court: I don't know whether there is.

Mr. Gillen: It should be eliminated then.

A. There is a contract.

Mr. Gillen: Then I ask that we see the contract, as the best evidence.

Q. Do you have the contract?

A. Mr. Haughey has the original contract.

Q. Do you have a copy of the contract?

A. I have a copy with me, yes.

Q. Mr. Silverman, I show you Plaintiff's Exhibit 20 for identification, which you have handed

(Testimony of Max Silverman.)

to me. Is that a copy of the only contract you had relating to this sale? A. I believe it is.

Q. Is this copy of the only contract which you received in connection with the transaction?

A. Yes, sir, I believe it is.

Mr. Thompson: I offer it in evidence, your Honor.

Mr. Gillen: Well, of course, we still offer the objection, may it please the Court, that it is incompetent, irrelevant and immaterial and hearsay as to the defendant in this case, not binding upon him, and purports to be a contract dated [109] February 4, 1943, between Max Silverman, the witness on the stand, and one Willie Kyne, making no reference whatever to the defendant in this case.

The Court: It will be admitted subject to a motion to strike if it is not connected.

Mr. Thompson: (Reads Exhibit 20.)

Q. Mr. Silverman, how was the purchase price of 16 thousand dollars allocated between the price for the lease, the price for the furniture and fixtures and equipment, the price for the licenses and the price for good will, as you recall?

Mr. Gillen: May it please the court, that is objected to as having been asked and answered and there is a contract here which speaks for itself and which this gentleman has testified is the only understanding there was between him and the buyer reduced to writing.

The Court: He said only reduced to writing, but he has heretofore stated there was some kind

(Testimony of Max Silverman.)

of distribution of this price for the various items and I can't see any reason why he can't so testify now. Objection will be overruled?

A. Well, I appraised the value of my business at the time at that price and I don't know how to say as to the values between licenses and fixtures, that the fixtures were so much money and the lease I had was worth so much and the licenses at a value approximately three thousand dollars, but we come to an understanding [110] of worth——

Mr. Thompson: I might have misunderstood your previous answer.

Mr. Gillen: Just a minute—I move it all be stricken.

The Court: What is the grounds, Mr. Gillen?

Mr. Gillen: Well, the man doesn't remember, for one thing, what comments he made were only his appraisal and not subject to agreement. He said he valued the fixtures at so much and the licenses and lease worth so much, without mentioning the amount of his valuation and not the subject of any agreement. The agreement is there.

The Court: Motion is denied.

Q. Mr. Silverman, do you recall whether or not the total price of 16 thousand dollars was allocated between these various items in different sums?

Mr. Gillen: Objected to as having been asked and answered.

The Court: Objection will be overruled.

A. Well, we didn't discuss it at the time as to the dollars and cents. At the time Mr. Kyne and

(Testimony of Max Silverman.)

myself were talking, we came to the conclusion that——

Mr. Gillen: So that conclusion, your Honor, would be rankly hearsay.

Mr. Thompson: When the witness says, "we came to a conclusion," that is statement of what the conversation was. [111]

The Court: It might be hearsay. Objection is sustained. That part of the answer he is about to give, he is not to give.

Q. What type of license do you refer to as having been transferred to Mr. Kyne in connection with sale? A. Liquor license.

Q. What did those licenses cost you?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, what the license cost him.

The Court: Objection sustained.

Mr. Shelton: If your Honor please, it is necessary on net worth statement for the government to do the very best it can to allocate between these different items if we establish that this property was a proper part of net worth statement in this case. The first effort would be to establish any agreement between the parties, buyer and seller, as to the values——

The Court (Interceding): We have nothing in this witness' testimony to show when these licenses were acquired.

Mr. Shelton: Well, counsel then would lay the foundation as to when they were acquired and then obtain such evidence as available to break down

(Testimony of Max Silverman.)

the cost between the various items for the purposes of tax computation.

Mr. Avakian: Your Honor, do I understand the Court is [112] entertaining argument on the objection sustained? If so, I would like to answer.

The Court: No. The reason why this is sustained is because I don't know when these licenses were procured.

Q. When did you acquire the liquor licenses, Mr. Silverman?

A. 1937, to the best of my recollection.

Q. Are those licenses that are renewed?

A. They are.

Q. When did you last renew the license?

A. Well, they are being renewed June 1st of every year. That would have been in 1942 when I renewed them.

Q. What did you pay for the license at that time?

Mr. Avakian: Objected to on the ground that the price he paid for the license in 1937—

The Court: No, that question is not directed to 1937. The last time of renewal, as I understand. Maybe I am wrong.

(Answer read.)

Mr. Avakian: This question then relates to renewal cost in 1942?

Mr. Thompson: Yes.

The Court: Answer the question.

A. \$110.00.

(Testimony of Max Silverman.)

Q. Mr. Silverman, in San Francisco does the actual license [113] fee represent the value of the liquor license? A. No, sir.

Q. What was present on the premises in the way of furniture and fixtures at the time you sold that to Mr. Kyne?

A. The front part of the store had shelving that holds the liquor, counters, cigar case, candy case, coca-cola case, magazine racks, display cases, and in the back room were 13 tables to my best recollection at present, chairs and chips and some cards.

Q. What was the value of the furniture and fixtures and equipment at the time you transferred and sold the property to Mr. Kyne?

Mr. Gillen: Just a moment, objected to as incompetent, irrelevant and immaterial, calling for opinion and conclusion of the witness and no foundation laid to show that he is qualified to place any valuation.

Mr. Thompson: He was the owner of the property, your Honor.

The Court: The objection is overruled.

A. Well, I valued it, as stated before, I valued the fixtures and the license and the whole thing as 16 thousand dollars. The way I arrived at those figures, I broke it down myself as to the value of the license, the value of the amount of business I have done, what the fixtures cost me, and Mr. Kyne tried to buy the place, I just put up one sum, that is the [114] amount I want for it and that is what he paid for it. It would be very difficult for me to

(Testimony of Max Silverman.)

say now as to what each and every piece of furniture or fixture in the store the actual value was.

Q. What was the reasonable value, in your opinion, of the furniture and fixtures which were included in the sale to Mr. Kyne?

Mr. Gillen: That has been asked and answered several times, apparently to the best of the witness' ability, and also calling for his opinion and conclusion and also an attempt to qualify him as an expert.

The Court: Objection overruled. Answer the question.

A. What is the question again?

(Question read.)

A. Well, I felt the reasonable price for the fixtures alone, in my own mind, was ten thousand dollars, and the balance would be license and leasehold value.

Q. When you refer to fixtures, do you include the furniture and all the equipment which you described in the premises?

A. The entire premises, all the fixtures.

Q. And the furniture too?

A. Furniture, right.

Q. What was the reasonable value of the liquor license at that time which you sold to Mr. Kyne?

Mr. Gillen: Objected to as having been asked and answered. [115]

The Court: Objection overruled. Answer the question.

A. I figured it would run about three thousand dollars, the value of the license.

(Testimony of Max Silverman.)

Q. What was the reasonable value of the leasehold interest which you transferred and sold to Mr. Kyne at that time?

Mr. Gillen: May it please the Court, I renew my objection to the whole line of questioning as hearsay, and also object that this has been asked and answered not once, but several times, and furthermore what the reasonable value of the leasehold is, it would seem to me, would have to be established through expert testimony.

The Court: Can't an owner give his opinion of the value of his property?

Mr. Gillen: An owner can say what it is worth to him, but I do not think he can give an opinion of the market value unless he establishes he is acquainted with realty in the particular location at the particular time.

The Court: Objection overruled.

(Question read.)

A. I valued it at three thousand.

Mr. Gillen: I move the answer be stricken. He said he valued it at three thousand. It is not responsive to the question.

The Court: Motion denied. [116]

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Speaking of that lease that you had, what length of time did it have to run, do you recall, in

(Testimony of Max Silverman.)

February or March of 1943? What was the length of time the lease had to run?

A. I don't recall the exact time, but I believe it was until 1946.

Q. And was there a renewal option on that lease, do you recall? A. I don't recall that.

Q. You don't have the lease with you, do you?

A. No, sir.

Q. Now, do you have any recollection of what date in 1946 the lease expired? A. No, sir.

Q. As a matter of fact, you are not sure it was 1946? A. No, I am not sure it was in 1946.

Q. Now, I understood you to describe this enterprise as a cigar stand where cigars and tobaccos and candies and magazines were sold, is that correct? A. That is right.

Q. And then there was a bar in connection with it? A. No bar.

Q. What kind of liquor license was that?

A. Package goods. [117]

Q. Where you buy bottled liquor and take it off the premises? A. That is right.

Q. Not consumed on the premises, like a cafe?

A. No, sir.

Q. And I understood you to say there was also a card room contained in an incorporated club?

A. That is right.

Q. That was known as the 186 Club, is that correct? A. Yes, sir.

(Testimony of Max Silverman.)

Q. And that club was incorporated under the laws of the State of California, was it not?

A. Yes, sir.

Q. I have handed you photostatic copy of what purports to be an incorporation under the laws of the State of California, counsel. When you finish looking at it, I intend to show it to the witness and offer it.

Q. I will hand you here, Mr. Silverman, two photostatic sheets, photostated on both sides, purporting to be (1) an official document of the State of California, purporting to contain also some supporting documentary data attached thereto. Would you glance at those and tell us, if you recall, whether or not those represent the incorporation and the Articles of Incorporation of the so-called 186 Club at San Francisco that you have described here?

A. To the best of my recollection, I believe it is something [118] like this.

Q. As a matter of fact, one of those sheets bears your signature, does it not?

A. I don't see my signature on here.

Q. May I look at it?

A. I never had those papers myself. They belong to the membership.

Mr. Gillen: I would like to offer this as defendant's exhibit in evidence.

Mr. Thompson: If the Court please, we object on the ground it is irrelevant and immaterial, inasmuch as there is no testimony to the effect that the corporation itself was included in any sale to Mr. Kyne. The sale was of the leasehold premises, fur-

(Testimony of Max Silverman.)

niture and fixtures and the inventory and stock-in-trade on hand.

The Court: The exhibit may be admitted and it will be Exhibit A.

Q. Now, Mr. Silverman, it is true, is it not, that when you became interested in the 186 Club and in the other enterprise, the cigar stand in conjunction therewith, that incorporated clubs incorporated under the State laws of California were legal organizations, which operated under the State laws of California?

Mr. Thompson: Objected to on the ground it calls for an opinion of the witness as to the law, your Honor. [119]

The Court: Objection overruled. Answer the question.

Q. Do you have the question in mind?

A. Yes. They were legal.

Q. It is true, is it not, that certain card games were prohibited by State law of California and certain other card games were recognized as legal games in California, is that correct?

Mr. Thompson: We make the same objection.

The Court: Same ruling.

A. As far as I know, some are legal and some are not legal.

Q. You know of your own knowledge, having been interested in that club, that, for example, draw poker was legal, unprohibited, while on the other hand stud poker was prohibited under the State law of California, is that correct?

(Testimony of Max Silverman.)

A. That is correct.

Q. And you know, of your own knowledge, under the State law of California, the games, so-called games of chance, were prohibited, while games, so-called games of skill, were the permitted games?

Mr. Thompson: Same objection.

The Court: Objection overruled. Answer the question.

Q. Isn't that true?

A. Well, as far as I know, the legal games were draw poker and no other games were permitted legally.

Q. Draw poker and panguingue. Do you recall what other games [120] were permissive games?

Mr. Thompson: I would like to know if panguingue—

The Court: He didn't give the answer as to panguingue.

Q. Do you recall, other than draw poker, what other games were legalized games in California?

A. Well, any game was that was draw was legal, so far as I understand. Panguingue also and draw poker, any game that you draw cards to are legal games.

Q. As distinguished from games that are so-called games of chance, where the skill of the player is not involved, is that correct?

A. That's right.

Q. I take it, Mr. Silverman, that you acquired your interest in this property from some predeces-

(Testimony of Max Silverman.)

sors, did you not? A. That's right.

Q. In other words, according to the exhibit that I have shown you here, the exhibit consists of two pages and one of a so-called Articles of Incorporation of the 186 Club, which appears to have been organized on June 29, 1939, by Eugene H. Stone, San Francisco, Irving D. Freeman and Bernard D. Freeman of San Francisco. Were they your predecessors? A. I couldn't say off-hand.

Q. But you bought your interest from some one else, you were not the original incorporator?

A. I bought the cigar store originally and I held the lease. [121] The club was operated by membership as a non-profit organization.

Q. Now, also this document, this Exhibit, Defendant's A, contains the certificate of incorporation of the Department of State of the State of California, does it not, the charter certificate of incorporation, is that correct, that first page of the document, the exhibit?

A. All I can say what I see in front of me. I guess it is. I am not an expert in that. I guess it is the charter.

Q. Signed by the Secretary of State and official seal of the State of California?

A. That is right.

Q. State Department form, is it not?

A. That is right.

Q. Of course, being a non-profit corporation, there was no stock issued, isn't that true, no stock in existence, so far as you knew?

(Testimony of Max Silverman.)

A. So far as I know there was none.

Q. And you sold your interest in this corporation together with the fixtures to Mr. Kyne, did you not?

A. Well, not so far as the corporation is concerned. I sold the fixtures.

Q. You sold the good will and everything that was there, as well as the good will in the name of the 186 Club, did you not? [122]

A. Yes. I couldn't sell the charter, because the charter wasn't mine. It belonged to the corporation and I can't sell it.

Q. Have you personally done anything with the 186 Club operation since you sold what you did sell to Mr. Kyne?

A. I don't get your question.

Q. Since you made this sale of whatever it was you sold to Mr. Kyne, have you personally done anything or had anything to do with the corporation, 186 Club?

A. No, sir.

Q. In other words, when you sold the good will, fixtures, inventory, the leasehold, furniture and everything else to Mr. Kyne, you, so to speak, washed your hands of it and walked away and it was left in Mr. Kyne's hands?

A. That is right.

Q. Including the name of the 186 Club and everything else that was there on the premises, is that true?

A. Yes.

Mr. Gillen: That's all.

Mr. Thompson: No further questions.

(Witness excused.)

LANUS CARDOZA

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name please? [123]

A. Lanus Cardoza.

Q. Where do you live?

A. 60 Halkin Lane, Berkeley.

Q. Where are you employed?

A. San Francisco. American Trust Company.

Q. How long have you been employed by the American Trust Company?

A. Twenty-six years.

Q. And where is the American Trust Company's business located in San Francisco?

A. At 464 California Street.

Q. What character of business does it conduct?

A. Banking business.

Q. What is your present position with the American Trust Company? A. Assistant auditor.

Q. Have you appeared here today pursuant to subpoena issued to the American Trust Company?

A. I am appearing, yes.

Q. And did that subpoena require you to bring with you certain records of the American Trust Company? A. It did.

Q. Will you produce them please? Mr. Cardoza, are you prepared to furnish photostatic copies of

(Testimony of Lanus Cardoza.)

each of the records of the American Trust Company which you have produced? [124]

Mr. Thompson: I would like to inquire of counsel at this time if they have any objection to having the photostats marked as exhibits rather than the original records?

Mr. Gillen: May we look at the documents first of all please? We have no objection to accommodating the bank or accepting photostats. Of course, we are not conceding they are significant.

Mr. Thompson: We understand that, Mr. Gillen.

Q. Mr. Cardoza, I show you Plaintiff's Exhibit 21 for identification; consists of a signature card for a commercial account and a transcript of a commercial account. Is that a record of the American Trust Company which is kept and maintained in the ordinary and usual and customary course of the operation of the business of that company?

Mr. Gillen: We will do this. We will stipulate those are true photostatic copies of the original bank records of the American Trust Company and that they may be offered for identification. If they are connected up later, if there is any significance, we have no objection from a technical standpoint as to the authenticity.

Mr. Thompson: You reserve only objection of relevancy and materiality?

Mr. Gillen: Yes, if prepared by you, we are satisfied they are true copies of records of the American Trust Company reflecting the activity of that particular commercial account. [125]

(Testimony of Lanus Cardoza.)

Mr. Thompson: I would like to state for the record this is the account of Hazel Harris, 100 Park Drive, San Francisco, California.

Q. Mr. Cardoza, does the American Trust Company operate more than one branch in its bank?

A. It does.

Q. From what branch of the American Trust Company are the records contained in Exhibit 21 for identification taken?

A. From the San Anselmo branch.

Mr. Thompson: Exhibit 22 for identification is transcript of account of H. & H. Sandwich Shop by Hazel or Violet Harris, together with signature card for the same account.

Mr. Gillen: In the interest of time we offer the same stipulation as to those photostatic documents.

Q. Mr. Cardoza, from what branch of the American Trust Company are the records contained in Exhibit 22 for identification taken?

A. From the San Anselmo branch.

Mr. Thompson: If the Court please, we offer Exhibits 21 and 22 in evidence, subject to their being connected up.

Mr. Gillen: Oh no, we have to object to that, if the Court please. I understand there is another witness here with these checks and let us see what happens. We have offered a stipulation and tried to save time.

Mr. Thompson: We appreciate that. [126]

The Court: What is your objection to the exhibit?

(Testimony of Lanus Cardoza.)

Mr. Gillen: It is incompetent, irrelevant, and immaterial, no foundation laid for anything, your Honor. It is a bank account of somebody else.

The Court: How about postponing the offer until you do connect it up?

Mr. Gillen: I think that is the proper way, your Honor and that is what we suggest.

Mr. Thompson: You may cross-examine.

Mr. Gillen: No questions.

(Witness excused.)

HAROLD B. TRAUNPOUR

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Harold B. Traunpour.

Q. Where do you live?

A. 2485 23rd Avenue, San Francisco.

Q. What is your business?

A. Banking sir.

Q. With what bank are you associated?

A. Crocker First National Bank in San Francisco.

Q. And where are the premises of the Crocker First National Bank situated in San Francisco?

A. 1 Montgomery Street. [127]

Q. What is your official position with the Crocker First National Bank?

(Testimony of Harold B. Traunpour.)

A. Assistant auditor.

Q. How long have you been employed at the Crocker First National Bank?

A. Thirty-four years.

Q. Have you brought with you, pursuant to subpoena, certain records of the Crocker First National Bank of San Francisco? A. Yes.

Q. Are you prepared at this time to furnish photostats of the records you are producing?

A. Yes.

Q. Will you produce first the signature cards and ledger accounts of the commercial account of the B & R Smoke Shoppe? Where are the originals of the ledger accounts?

A. They have been destroyed.

Q. What record have you kept of the original ledger accounts? A. We have microfilm.

Q. And the documents which you are producing now are blown-up films taken from your microfilm record? A. That is correct.

Mr. Gillen: Now, our understanding is—correct me if we have a misapprehension—Mr. Traunpour has the original signature cards for this account, but as to ledger sheets, that are reflected, that are in my hands here, these are photostatic [128] copies made up from microfilm which were used to supplant the original larger ledger sheets. The original sheets were destroyed and these smaller microfilms used in their place as permanent records?

A. That is correct.

Mr. Gillen: We have no objection to stipulating

(Testimony of Harold B. Traunpour.)

that these may go in under the same conditions as stipulated, go in for identification. No technical objection raised as to the authenticity of the bank records. That is the account of William Kyne. But we would object to their going into evidence at this time.

Mr. Thompson: We offer Exhibit 23 for identification in evidence, without any reservation or restriction whatever, and call your Honor's attention to the fact that the income tax return for Elmer Remmer and his wife, Helen Remmer, Plaintiff's Exhibit 1, which is for the years 1944 to 1946 inclusive, report income from the B & R Smoke Shoppe.

The Court: And the period of time covered by those other documents cover the same place of business in the same period of time that is embraced within the admitted tax returns?

Mr. Thompson: Run from the period February 29, 1944, your Honor, to July 17, 1946.

The Court: Do you want to examine them with that point in mind? [129]

Mr. Gillen: May it please the Court, we call attention to the fact that the signature here sets forth: "I am the sole owner of the B & R Smoke Shoppe. Checks to be signed by myself only. William C. Kyne."

The Court: Very well, but the income tax returns, I presume, show that the defendant has some interest in that same institution?

Mr. Gillen: No, the income tax returns, your

(Testimony of Harold B. Traunpour.)

Honor, show only that Mr. Remmer received some income from that institution. That doesn't mean that that is his bank account.

The Court: Very well. Exhibit will be admitted in evidence, Exhibit 23.

Mr. Gillen: He might only be working there. He might be an errand boy.

The Court: Exhibit 23.

Q. Mr. Traunpour, as part of Exhibit 23, I notice in the photostats of the ledger accounts the typewritten transcript with two items on it, \$19.20 under date of February 7, 1944, with balance on that date of \$712.27, and an item of \$700 on February 17, 1945, with an item of \$12.27, will you please explain how that typewritten transcript appears as part of your photostats?

A. It is merely because the photostat just preceding is very illegible and it was done over in this manner, just for clarifying sake. That is the way it came out of the photograph. [130] You can hardly see it at all.

Q. It is duplication of the photostat which precedes it?

A. That is right. It is a clear picture.

Q. Will you produce the signature cards and ledger accounts of the commercial account in the names of Elmer F. Remmer or A. F. Pritchett. Mr. Traunpour, what period of time is covered by the records included in Exhibit 24 for identification?

A. That covers period of time from February 17, 1945, to March 19, 1948.

(Testimony of Harold B. Traunpour.)

Mr. Gillen: No objection to Exhibit 24 for identification going into evidence.

Mr. Thompson: We offer it, your Honor.

The Court: It will be admitted in evidence, Exhibit 24.

Q. Mr. Traunpour, will you produce the signature card of safe deposit box 130 in the names of Henry Clay and William E. Kyne, receipt for the return of the key to that box, and any other papers and records you have relating to the box?

Mr. Gillen: I take it, Mr. Traunpour, you have the originals of these cards? A. I do.

Mr. Gillen: Now, the defense is prepared to stipulate to the authenticity of these photostats as true photostatic copies of the original bank records and there has been no offer in evidence yet. However, in anticipation of an offer, we would make an objection. [131]

Mr. Thompson: It is my understanding that the defendant reserves only the objection of relevancy and materiality.

Mr. Gillen: That is right. Are you going to offer it at this time?

Mr. Thompson: No. I am just restating what I understood your stipulation to be.

Mr. Gillen: Our stipulation is that we will not raise any technical objection to the authenticity of the photostats as being true photographs of the records in the bank. However, we reserve any right to object to the document for any use whatsoever upon any ground or basis that arises.

(Testimony of Harold B. Traunpour.)

Mr. Thompson: You stipulate that these are records of the bank kept in the ordinary and regular course of business?

Mr. Gillen: We will so stipulate to that, yes.

The Court: They have been marked?

Mr. Thompson: 25 for identification.

Q. Will you produce the signature cards and ledger account for the commercial account of Harold H. Maundrell for the period May, 1945 to June, 1946. Mr. Traunpour, does Exhibit 26 for identification consist of the signature card and transcript of a ledger account of the commercial account in the Crocker First National Bank entered under the name of Harold H. Maundrell?

A. That is correct.

(Jury and alternate jurors admonished and recess taken at 2:50 p.m.) [132]

3:05 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. TRAUNPOUR

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Gillen: Prosecution's Exhibit No. 26 for identification, the signature card and the photo-

(Testimony of Harold B. Traunpour.)

stats, microfilms, of the commercial account of Harold H. Maundrell, we are prepared to stipulate that these are true authentic copies of the bank records of this account and we agree that they may go in evidence, subject to a motion to strike if they are not connected.

The Court: Very well.

Mr. Thompson: We offer them in evidence, your Honor, Exhibit 26 for identification.

The Court: I presume you accept the stipulation?

Mr. Thompson: Yes.

The Court: Exhibit 26 is admitted in evidence, subject to the motion to strike if it is not connected.

Q. Mr. Traunpour, will you produce the signature card and ledger account for the commercial account of Elmer F. Remmer and Harold H. Maundrell for the period June, 1945, to January, 1947?

Mr. Thompson: I ask that the documents the witness has produced be marked Plaintiff's Exhibit 27 for identification.

The Court: It may be so marked.

Mr. Gillen: May it please the Court, during the recess [133] this document was examined. We are prepared to stipulate, in the interest of time, this is a true and authentic photostatic copy of the original record of the bank on this account, and we are willing to stipulate that it may go into evidence, subject to a motion to strike, with the exception of the last three pages, which are for the year 1947

(Testimony of Harold B. Traunpour.)

and which we would object to if offered in evidence, on the ground they are incompetent, irrelevant and immaterial and beyond the time embraced in the indictment, which goes only to the 31st of December, 1946, as I recall.

Mr. Thompson: Your Honor, the pages to which counsel objects, which are part of this offer, are for January, 1947. It is well known that in the ordinary course of banking business checks issued and passed during December of 1946 or preceding months frequently are not received by the bank—

The Court: I wonder if the records would disclose the checks that have to do with 1946? Could you make some arrangement whereby it would concern only 1946 transactions?

Mr. Avakian: Your Honor, as I understand it, the net worth computations of the government, insofar as this account, would concern the balance of that account on December 31, 1946. I do not see that anything that happened in 1947 could affect that balance.

The Court: I think we could resolve this by admitting [134] this exhibit in evidence, with the understanding that no material appearing in the last three pages, except checks which were received prior to January 1, 1947, would be admitted. That is just a suggestion.

Mr. Thompson: I believe your Honor stated checks received prior to December 31st.

The Court: January 1, 1947.

(Testimony of Harold B. Traunpour.)

Mr. Thompson: Prior to January, 1947, or January 31st?

The Court: January 1st.

Mr. Thompson: What we had in mind, your Honor, if checks drawn on the account——

Mr. Gillen: We withdraw our objection. Let it all go in.

The Court: All right. It is admitted then.

Mr. Gillen: I should not have said we withdraw the objection. We withdraw the condition imposed on it. We place no condition on it. It may go in without condition.

The Court: Very well.

Q. Mr. Traunpour, are you familiar with the operations in the teller's cage at the Crocker First National Bank and the various stamps that are used by a teller in the Crocker First National Bank?

A. I think I would recognize them.

Q. What does a stamp on a check placed there by the Crocker [135] First National Bank, stating, "Credit to the account of drawer" mean?

A. It is credited to the account of the person who draws the check.

Q. And what would be involved in a transaction of that character?

A. What would be involved?

Q. Yes. I mean, how would that take place? Under what circumstances would that stamp be used?

A. Well, I have very seldom seen that particular

(Testimony of Harold B. Traunpour.)

stamp used. There is one that is a little more in use, "Credit to the account of drawer."

Q. Well, do you know what that stamp means if it should appear on the check?

A. Well, as I just said, merely that it is credited to the account of the person who signs the check and draws the check.

Q. The maker of the check?

A. The maker of the check.

Q. And would that stamp be placed on a check if the person who drew the check on the account delivered it to the teller for deposit to the same account? Do you understand?

A. Would you clarify that a little.

Q. Would the stamp, "Credited to the account of drawer" be placed by the teller on the check if that check is offered for deposit to the same account upon which it is drawn? [136]

A. It wouldn't necessarily.

Mr. Gillen: I am afraid I am going to have to offer an objection, that this is purely some hypothetical matter that counsel is going into now and it is obvious that Mr. Traunpour, with all due respect to him, is not familiar with the particular significance of certain symbols or stamps of the bank. He said he thought he recognized them, but he seems to be unfamiliar with the particular hypothetical proposal made by the prosecutor.

The Court: I think the question perhaps is not understood by the witness.

Mr. Thompson: I withdraw the question, your Honor. You may cross-examine.

Mr. Gillen: No questions.

(Witness excused.)

CASPER HARRIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Casper Harris.

Q. Where do you live?

A. San Anselmo.

Q. What is your business?

A. Unemployed at present.

Q. Are you married? [137] A. Yes, sir.

Q. What is your wife's name?

A. Hazel Harris.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, sir.

Q. How long have you known him?

A. Twenty-five or 30 years.

Q. Where have you known him?

A. In San Francisco, also Cal-Neva.

Q. Since in the year 1934 where, if you know, has Mr. Remmer resided?

A. 1934, I wouldn't know.

Q. Since 1934?

A. In the wintertime well Orinda, California, and Cal-Neva.

(Testimony of Casper Harris.)

Q. In the wintertime?

A. In the wintertime I believe Orinda.

Q. And where in the summer time?

A. In Cal-Neva during the season.

Q. In the year 1945 were you and your wife engaged in any business in California?

A. My wife had a sandwich shop in San Anselmo.

Q. What is the name of the business?

A. H. & H. Sandwich Shop.

Q. Located in San Anselmo, California?

A. Yes, sir. [138]

Q. In the year 1945 did you have any business transactions with Mr. Elmer Remmer in connection with the operation of the H. & H. Sandwich Shop?

A. Yes, sir, I borrowed \$2,500 from Mr. Remmer.

Q. Where did that transaction take place?

A. In San Francisco.

Q. Where in San Francisco?

A. I received the money at 50 Mason Street.

Q. From whom did you receive the money?

A. From Mr. Remmer.

Q. You received the sum of \$2,500?

A. Correct.

Q. Did you receive it in cash or by check?

A. Cash.

Q. Was a note executed to evidence the obligation? A. No, sir.

Q. What did you do with the \$2,500?

A. Gave it to my wife.

(Testimony of Casper Harris.)

Q. In your conversation with Mr. Remmer relating to the loan, did he indicate to you where or to whom repayments of the loan should be made?

A. No. Checks were made out to Mr. Remmer to his home in Orinda, I believe.

Q. Did you, yourself, make any repayments on the loan?

A. The last payment, yes, sir, in cash. [139]

Q. You say you made that payment in cash?

A. Yes, sir.

Q. Of how much money? A. \$250.

Q. When did you make that last payment?

A. I think it was in 1948.

Q. Were the other payments on the loan made?

A. They were made by check, yes, sir.

Q. By whom? A. By Mrs. Harris.

Q. What was the business located at 50 Mason Street where you met Mr. Remmer?

A. It was their office, I believe.

Q. What was the name of it? Did it have a name, as far as you know?

A. Not that I know of. It did have a name, but I can't recall it.

Q. Do you think it was the B. & R. Shop?

A. I don't know.

Mr. Gillen: Just a moment—do you think—

The Court: He has answered he doesn't know.

Q. What character of business was carried on there?

A. It was his office, as far as I know.

Mr. Thompson: You may cross-examine. [140]

(Testimony of Casper Harris.)

Cross-Examination

By Mr. Gillen:

Q. Mr. Harris, as I understand your direct testimony, you asked Mr. Remmer, whom you had known for 25 or 30 years, to loan you \$2,500 for your wife's business, is that correct?

A. Correct.

Q. And he gave you \$2,500 in cash and took no note? A. Correct.

Q. And how was the money paid back? You stated by check. What arrangement was made? Did you make any arrangement?

A. It was understood my wife was to pay back \$250 a month. The business was running away with her and her checks were slow coming in and Mare Island and the San Francisco Presidio, sometimes her checks would be six months coming.

Q. In other words, she had a wholesale sandwich shop and her business grew so fast and the income came so slow, she wasn't able to handle it?

A. That is right.

Q. And she needed some additional capital?

A. That is correct.

Q. And as I understand your testimony, your wife did pay all this loan of \$2,500 back at the rate of \$250 per month, by check sent to Mr. Remmer's home and the last payment was made by you in cash to Mr. Remmer for the year 1948, is that correct? A. Correct.

Q. And that last payment was for how much, do you recall? [141]

(Testimony of Casper Harris.)

A. Two hundred fifty dollars.

Q. That was the last \$250 that was owed?

A. Yes, sir.

Mr. Gillen: I think that is all.

(Witness excused.)

MRS. HAZEL HARRIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. Mrs. Hazel Harris.

Q. You are the wife of Mr. Casper Harris who just preceded you on the witness stand?

A. That's right.

Q. And you live in San Anselmo, California?

A. That is right.

Q. During the years 1945 and 1946 did you operate a business in San Anselmo, California?

A. That is right.

Q. What was the name?

A. H. & H. Sandwich Shop.

Q. Did you have a commercial bank account in connection with the operation of that business?

A. Yes.

Q. Where was that bank account? [142]

A. It started out with the American Trust Bank.

Q. In Anselmo, California? A. Right.

(Testimony of Mrs. Hazel Harris.)

Q. Did you also have a personal account in that bank? A. That's right.

Q. Do you know Mr. Elmer Remmer?

A. Well, I have met him a few times. He was my husband's friend, but I have met Mr. Remmer several times.

Q. During the years 1945 and 1946 did you send payments to Mr. Remmer?

A. Well, I perhaps addressed the letter to Mrs. Remmer, if I remember right. I wouldn't be positive about that, but I think it was addressed to Mrs. Remmer.

Q. And you did make payments to Mr. Remmer? A. Yes, I made payments the same way.

Q. How many payments did you make during that period? A. Nine.

Q. And in what amounts?

A. \$250 each, each check.

Q. Do you have any checks representing the payments that you made to Mr. Remmer?

A. Yes.

Q. Will you produce them please?

Mr. Gillen: If counsel wishes to offer these in evidence, we will stipulate that they may go without objection. [143]

Mr. Thompson: I offer in evidence as Plaintiff's Exhibit 28, your Honor, seven checks, the first being dated September 15, 1945, payable to the order of E. Bremmer for the sum of \$250; the second being dated October 15, 1945, payable to the order of E. Bremmer for \$250; the third being

(Testimony of Mrs. Hazel Harris.)

dated November 15, 1945, payable to the order of E. Bremmer; the fourth being dated May 6, 1946, payable to the order of E. Remmer for \$250; the fifth being dated October 6, 1946, payable to the order of E. Remmer for \$250, the next one dated July 6, 1946, payable to the order of E. Remmer for \$250, and the last dated June 6, 1946, payable to the order of E. Remmer for \$250.

The Court: By stipulation they are admitted in evidence.

Mr. Gillen: Yes, that is the stipulation; they may be offered in evidence.

Q. Referring to Plaintiff's Exhibit 28, Mrs. Harris, I note three checks drawn to the order of "E. Bremmer." Who is E. Bremmer?

A. Well, that was meant to be Elmer Remmer, but I didn't know him well enough at the time when I first started writing the checks and I thought his name was Bremmer until I was corrected by my husband.

Q. What was the purpose of sending Mr. Remmer those seven checks making up Exhibit 28?

A. To repay the loan.

Q. You testified, I believe, that you made nine rather than [144] seven payments by check to Mr. Remmer. Do you have the other two checks?

A. No, I couldn't locate them.

Q. Were the other two checks that you have not been able to find also drawn payable through the bank account of the H & H Sandwich Shop or

(Testimony of Mrs. Hazel Harris.)

bank account of Mrs. Hazel Harris in the American Trust Company?

A. That I do not know.

Q. Did you have any other bank accounts at that time?

A. No, I did not. I do not believe so anyway.

Q. Do you know whether or not the other two checks which you have been unable to find were presented to your bank for payment and charged against your account?

A. I don't understand your question.

Q. You understand, Mrs. Harris, when you give somebody a check drawn upon your bank account, it finally comes back to your bank and the bank charges it against your account? A. Yes.

Q. You testified you have delivered to Mr. Remmer two checks which you have been unable to find. Do you know whether or not those two checks were in the sum of \$250, were actually charged against your bank account?

A. Oh they must have been. They have to be, but I just have not taken care of my checks evidently and I couldn't find them.

Mr. Thompson: You may cross-examine. [145]

Cross-Examination

By Mr. Gillen:

Q. You know you wrote 9 checks however?

A. That is right.

Q. And initially, as I understand your testimony, your husband having obtained this loan for

(Testimony of Mrs. Hazel Harris.)

you from a friend to assist you in your business, you were initially under the impression his name was Bremmer instead of Remmer?

A. That is right.

Q. And that was because of your lack of intimate acquaintance? A. That is right.

Q. And after writing it as E. Bremmer, your husband corrected you and told you it was Remmer?

A. That is right.

Q. And thereafter you wrote all other checks to Mr. Remmer, is that correct? A. Yes.

Q. Is it your best recollection, beside a couple of checks written, I believe in the year 1945, latter part of 1945, that all subsequent payments by check by you were made in the year 1946?

A. Well, isn't there a few months between 1945 and 1946 there?

Q. Yes, there is.

A. I wouldn't know which checks are missing.

Q. In other words, according to the checks as introduced by counsel under our stipulation, the first check was written September [146] of 1945, the second October, the third check November, and then there is a space of time, the next check appears to be in May of 1946 and then a check in October of 1946.

A. Perhaps I didn't pay on time as I should.

Q. I beg your pardon, the next check in June, none in July, and the next in October of 1946. Would you say that all of your checks were paid in

(Testimony of Mrs. Hazel Harris.)

1946 excepting the three which were paid in 1945, is that your best recollection at this time?

A. I really don't know when the others were paid.

Q. Did you completely pay the \$2,500, or was additional payment made by some one other than yourself?

A. No, the last payment was made by my husband by cash.

Q. Do you have any recollection now as to whether or not those two checks that you were unable to find were issued in 1945 or during the year 1946?

A. I couldn't say.

Q. Would you say it was one year or the other, that is 1945 or 1946?

A. I just couldn't say because I don't remember.

Q. Do you still have that business, the H & H Sandwich Shop?

A. No.

Q. When did you give that business up?

A. Shortly after the war was over.

Q. In 1946?

A. One month after the war was over. [147]

Q. By the way, Mrs. Harris, do you recall when you got that money, the \$2,500?

A. Well, some time in the year 1945. It would have to be in the year 1945.

Q. What was the necessity for you having that additional capital?

A. Well, my business—it was my first experience in business and I didn't realize it cost as much to go into business as it did and I needed more

(Testimony of Mrs. Hazel Harris.)

money to carry me along. I was selling wholesale sandwiches and needed more money to pay my help and current bills because the government doesn't pay at the end of the month like a lot of people do, the first of the month. It took them 15 or 20 days sometimes to pay me and the people I bought from demanded their money, so I needed the money to carry on.

Q. You had to have additional capital and your husband effected this loan to you? A. Yes.

Q. Who delivered the \$2,500 to you?

A. My husband delivered it.

Q. I take it you put it in your commercial account?

A. I put it in there but I can't find a ledger that I deposited \$2,500, but I perhaps used a part in cash for something else, but I don't remember what—different bills coming in for different accounts. I can't say which one on the ledger it would be. [148]

Q. Did you have any partner in that sandwich shop?

A. I really didn't, but I started out to have. After about a week or ten days my sister-in-law started out with me, but she didn't have sufficient capital to keep up with me, so she backed out. That is why her name is on the bank signature when I opened the account.

Q. Did you have any other partner at any time in that business? A. No.

Q. Was Mr. Elmer Remmer, the defendant in

(Testimony of Mrs. Hazel Harris.)

this case, ever a partner or ever have an interest?

A. I should say not.

Q. And payments that you made to him were exclusively for the return of loan made to you through your husband by Mr. Remmer?

A. Absolutely.

Mr. Gillen: That's all.

Redirect Examination

By Mr. Thompson:

Q. When did you open the business of the H & H Sandwich Shop? A. In the year 1945.

Q. Do you recall when?

A. No, probably my husband would know more about it than I.

Q. Approximately?

A. I don't remember the exact date. It seems to me like it was in June. I am a very funny person, I can't remember dates. It seems to me it was in the fall time, or the late summer or fall. [149]

Recross-Examination

By Mr. Gillen:

A. Mrs. Harris, with regard to the two checks that you were unable to locate, I note in the checks that were introduced in evidence under the prosecution's Exhibit 28, there is no reference made or any check found for the month of November, 1946, but I note in the prosecution's Exhibit 21—

Mr. Thompson: If the Court please, I object to

(Testimony of Mrs. Hazel Harris.)

counsel reading from any exhibit not admitted in evidence at this point.

Mr. Gillen: I was just looking at that now and see that it isn't. I wonder if I might refresh the witness' recollection by showing her Exhibit 21?

The Court: I think so.

Mr. Thompson: If the Court please, I offer Exhibit 21 in evidence.

Mr. Gillen: I think there is no objection to it.

The Court: Exhibit 21 is now in evidence.

Mr. Thompson: We also offer Exhibit 22 in evidence.

Mr. Gillen: No objection to either of those.

The Court: Exhibit 22 is admitted.

Q. I note in the prosecution's Exhibit 21, which purports to be copy of the activities of a commercial account in the name of Hazel Harris, 100 Park Drive, that in the month of November of 1946 there appear vouchers in the form of some checks issued for \$250 each in two instances, down at the bottom of the page. Would that refresh your recollection of the two checks you were unable to find, that either one or both of those might be the [150] checks you couldn't find?

A. One is for \$250 and one for \$256.

Q. I believe that is right.

A. There would be no reason for the \$256 given for the payment and the one of \$250 I wouldn't say, because it could be or could not be.

Q. That doesn't assist you?

(Testimony of Mrs. Hazel Harris.)

A. No, I don't know whether that would be the one or not.

Q. Now I note this exhibit, Mrs. Harris, and it may be examined by you if you wish, or by counsel, this exhibit No. 21 in evidence, that there are a few instances of checks written in the sum of \$250. Can you think of anybody other than Mr. Remmer that you would with some regularity write out a check for \$250?

A. I think I live the average life. There could be most anybody, I wouldn't know.

Q. That doesn't help you. All right.

(Witness excused.)

WARREN T. SYLVEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Warren T. Sylvey.

Q. Where do you live?

A. 2685 18th Avenue, San Francisco, [151]
California.

Q. What is your business? A. Banking.

Q. By whom are you employed?

A. Bank of America, San Francisco.

Q. In what capacity?

A. Assistant vice-president.

(Testimony of Warren T. Sylvey.)

Q. Are you appearing here pursuant to a subpoena issued and served upon the Bank of America National Trust and Savings Association at San Francisco? A. I am.

Q. Have you brought with you certain records of the Bank of America? A. I have.

Q. Will you produce the signature cards and ledger accounts of the account of B & R Smoke Shoppe for the period March 12, 1943, to January 23, 1945? Are you prepared to supply photostats of the bank's original records? A. I am.

Q. Have you also brought with you the original records of the bank? A. I have.

Mr. Thompson: I ask the records produced by the witness in response to my request be marked Exhibit 29 for identification.

Mr. Gillen. In the interest of time, we are prepared [152] to stipulate that Exhibit 29 for prosecution identification comprise a true and authenticated copy of the original records of the bank for this account and may be offered in evidence if the prosecution so desires, subject, of course, to our motion to strike in the event it is not connected up when it comes to the material issues of this case.

Mr. Thompson: We accept the stipulation, your Honor.

The Court: It may be admitted in evidence, Exhibit 29, subject to motion to strike.

Q. Mr. Sylvey, will you produce signature cards and ledger accounts for the account of the 186

(Testimony of Warren T. Sylvey.)

Club for the period October 8, 1946, to January 31, 1947?

Mr. Gillen: May we see the originals at the same time?

Mr. Thompson: I ask that the documents produced by the witness at my request, your Honor, be marked Plaintiff's Exhibit 30 for identification. This witness is to produce a number of exhibits and if I could be permitted to call for them and have them marked for identification, then the attorneys might have opportunity to examine them all at once; if we could proceed in this way.

Mr. Gillen: That is the way we suggested a number of days ago, that we be permitted——

The Court (Interceding): We don't care what your suggestion was several days ago. Do you consent to this or not? [153]

Mr. Gillen: The only reason I made this remark——

The Court: I don't care to have any remark made. Let us forget a couple of days ago.

Mr. Thompson: My suggestion wasn't made in a critical way.

The Court: All right.

Mr. Gillen: I don't want to be critical, because we have to read things we don't know about.

The Court: We don't need to have any remarks. Proceed. Let us not have any trouble.

Mr. Gillen: I am not having any trouble. I just want to speak about something.

The Court: I don't want to hear from you.

(Testimony of Warren T. Sylvey.)

Mr. Gillen: Very well, I will sit down then.

The Court: You may proceed with the examination of the witness.

Q. Mr. Silvey, I show you Plaintiff's Exhibit 30 for identification. Are those photostats of the original records of the Bank of America maintained and kept by the bank in the ordinary and customary course of the business of the bank?

A. They are.

Q. Is it part of the business of the Bank of America to keep and maintain records of that character?

A. It is.

Q. And do those records consist of the signature cards and [154] transcript of the ledger account pertaining to the account of the 186 Club?

A. They are.

Q. Do the records contained in Exhibit 30 for identification refer to a period of time from October 8, 1946 to February 17, 1947?

A. They do.

Mr. Thompson: I offer the exhibit in evidence, your Honor.

Mr. Gillen: If I dare, I might suggest that I was going to stipulate to that.

The Court: Just a minute. I don't want any remarks like that—"if I dare." I am not going to tolerate any sarcasm from you or any one else. When you say if you may dare, it is not very kind or courteous remark. Let us go along.

Mr. Gillen: May it please the Court, I am an advocate.

(Testimony of Warren T. Sylvey.)

The Court: Don't talk, because I will not tolerate——

Mr. Gillen: You are being very unfair. I can't even explain. You are being unfair. You won't even permit me—I am an advocate in this court. You refer to me as outsider and not belonging here.

The Court: We will excuse the jury until Monday morning at 11:00 o'clock, and please remember the admonition you have heard so many times, not to discuss among [155] yourselves or any one else any matter connected with the trial of this case, or form or express any opinion on this case until it is finally submitted to you, and I mentioned at the beginning of the trial and you promised that you would not read the newspaper reports and please do not do so and do not permit any one to talk to you about this case until it is finally submitted. If any should persist in talking to you, please report that person to the Court. We will be in recess until Monday morning at 11:00 o'clock in this case. We have a calendar to call at 10:00 o'clock.

(Jury excused at 4:05 p.m.)

(In the absence of the jury.)

The Court: Now, I want to tell you, Mr. Gillen, I do not want to punish you for contempt, but you are going to force me to do it. I do not want any back talk from you. I try to conduct this trial fairly. I have not any prejudice against anybody from San Francisco or from Africa. Now, I don't want any back talk and when you make a remark,

"If I dare," addressed to this Court, you can't get away with it. If I have any talk from you any more, I will commit you for contempt of court, understand it.

Mr. Gillen: Might I say to your Honor, I realize I am [156] an officer of this court—

The Court (Interceding): I don't want any talk. I will hear only when you ask questions and address remarks to the jury but none such remarks to me. We will be in recess in this case until 11:00 o'clock and all witnesses subpoenaed are ordered to be here at that time. Court will convene at 10:00 o'clock to call the calendar Monday morning.

Mr. Golden: May I request in another matter we would like to make some arrangement to have matters which are in evidence available at seasonable times and under seasonable conditions so we can examine and take photographs.

The Court: Can you make some arrangement with counsel, Mr. Clerk?

Mr. Golden: We have no objection if we can make proper arrangements with the clerk.

The Court: They may not be taken from the clerk's office. They may be examined at any reasonable time to suit the clerk's office hours.

(Recess taken at 4:15 p.m.) [157]

Monday, December 3, 1951, 11:35 A.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

Mr. Pike: Your Honor, Mr. Walter M. Campbell, Jr., is present as counsel in the case.

The Court: Exhibit 30 was offered in evidence and no ruling was made. Was there any objection?

Mr. Gillen: No, not yet and we were going to stipulate the exhibit may go in.

The Court: Exhibit 30 is admitted in evidence.

MR. SILVEY

resumed the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Silvey, will you produce the signature cards and ledger accounts for the account of the defendant for the period October 8, 1941 to January 31, 1947.

Mr. Thompson: Your Honor, I ask that these documents the witness has produced in response to my request be marked Plaintiff's Exhibit 31 for identification.

The Court: They may be so marked.

Q. Mr. Silvey, will you produce the signature cards and ledger accounts for the account for the 110 Eddy Street for the period from September 23, 1942 to February 1, 1945, and for the period from February 5, 1945 to January 31, 1947?

Mr. Thompson: Your Honor, I request the ex-

(Testimony of Warren T. Silvey.)

hibits he [158] has produced in response to my request be marked Plaintiff's Exhibit 32 for identification.

The Court: So marked.

Q. Mr. Silvey, will you produce the signature cards and ledger accounts of the account of William E. Kyne for the period from September 15, 1942 to March 5, 1945?

Mr. Thompson: I ask that the records the witness has produced in response to my request be marked Exhibit 33 for identification.

The Court: It may be so ordered.

Q. Mr. Silvey, will you produce the signature cards and ledger account for the account of the Menlo Club for the period October 2, 1946 to March 11, 1948?

Mr. Thompson: I ask that the records produced by the witness be marked Plaintiff's Exhibit 34 for identification.

The Court: So marked.

Q. Mr. Silvey, from what branch of the Bank of America have the records which you have so far produced at the trial been taken?

A. The Day and Night office, Bank of America in San Francisco.

Q. What is the address of that office?

A. No. 1 Powell.

The Court: I think it might be well to take a recess so you will have time to look over these exhibits.

(Jury and alternate jurors admonished and recess taken at 11:45 a.m.) [159]

Afternoon Session, December 3, 1951, 2:00 P.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

MR. SILVEY

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Gillen: May it please the Court, defense counsel has examined the prosecution's exhibits for identification Nos. 31 to and including 34. We are prepared to stipulate that they may be offered in evidence without objection.

The Court: Very well.

Mr. Gillen: Of course, that is subject to the provision that we mentioned the other day and your Honor held, subject to the motion to strike in the event they are not connected with this defendant, they being in bank accounts of other names.

Mr. Thompson: That is satisfactory.

The Court: Pursuant to stipulation, Exhibits Nos. 31, 32, 33, and 34 will be admitted.

Q. Now, Mr. Silvey, you have also brought, pursuant to the same subpoena, certain records of the Grand Lake Branch of the Bank of America?

A. I have.

Q. Will you produce at this time the signature card and ledger accounts for commercial account of Mrs. Helen L. Remmer for the period June 1, 1945, to July 31, 1947, together with the [160] fol-

(Testimony of Warren T. Silvey.)

lowing deposit slips for the account: June 19, 1945, for \$250; July 17, 1945, for \$250; August 17, 1945, for \$200; May 6, 1946, for \$400; June 6, 1946, for \$250; August 5, 1946, for \$350; September 16, 1946, for \$250; October 9, 1946, for \$250; December 10, 1946, for \$250, and January 6, 1947, for \$250.

A. All right.

Mr. Thompson: Your Honor, I request that these records, all relating to the account of Mrs. Helen L. Remmer on the Grand Lake Branch of the Bank of America in Oakland, California, be marked Plaintiff's Exhibit 35 for identification.

The Court: It may be so marked.

Q. Mr. Silvey, you have also brought records from the 12th & Broadway Branch in Oakland of the Bank of America? A. I have.

Q. Will you produce the following cashier's checks and applications for cashier's checks, bearing the following numbers: No. 25166567, dated August 14, 1942? A. For \$14,000.

The Court: Never mind mentioning the amounts.

A. I am sorry.

Q. Mr. Silvey, you have handed me Bank of America cashier check No. 25166567. You were also subpoenaed to produce the application for that check. Do you have that record? A. I do not.

Q. Where is that record? [161]

A. It has been destroyed.

Mr. Thompson: I ask that the cashier's check

(Testimony of Warren T. Silvey.)

indicated be marked Plaintiff's Exhibit 36 for identification.

The Court: So marked.

Q. Mr. Silvey, under what circumstances are the bank's applications for cashier's checks destroyed?

A. Six-year period.

Q. You retain them for six years and then they are all destroyed? A. That is correct.

Q. Have you brought with you cashier's check No. 25166830, dated August 19, 1942?

A. I have.

Q. Will you produce it, please?

Mr. Thompson: I ask the check produced, your Honor, be marked Plaintiff's Exhibit 37 for identification.

The Court: So marked.

Q. Mr. Silvey, have you also produced check No. 25107378, dated February 11, 1946?

A. Will you repeat the number?

Q. 25107378. A. I have that number.

Q. The date is incorrect that I read to you?

A. The date is incorrect.

Q. What is the date? [162]

A. February 8, 1946.

Q. You also have produced with it the application for the check? A. I have.

Mr. Thompson: I ask cashier's check and application be marked Plaintiff's Exhibit 38 for identification, your Honor.

The Court: So marked.

Mr. Gillen: Are those Oakland branches?

(Testimony of Warren T. Silvey.)

Mr. Thompson: Yes, those records are all from the 12th & Broadway Branch in Oakland.

A. Also known as Oakland Main Office.

Q. Have you also produced, Mr. Silvey, cashier's check No. 25107434? A. I have.

Q. Is that dated February 11, 1946?

A. That is correct.

Q. Do you have the application for that check?

A. I do.

Q. Will you produce that, please?

Mr. Thompson: I ask the check and application be marked Plaintiff's Exhibit 39 for identification.

The Court: So marked.

Q. Referring, also, Mr. Silvey, to the records of the Oakland Main Office of the Bank of America, have you produced, pursuant to subpoena, the records of the bank relating to loan [163] No. 25288?

A. I have.

Q. Regarding loan to Mrs. Helen Remmer and Miss Dorothy A. Remmer? A. I have.

Q. Have you handed me the only records you have brought relating to that?

A. No, I have the original. Now when you say the only record, what do you mean?

Q. What is the bank designation of the record you have produced?

A. This is the loan record.

Mr. Thompson: I ask that the record produced, your Honor, be marked Exhibit 40 for identification.

(Testimony of Warren T. Silvey.)

The Court: Is it understood that the photostat copy may be marked?

Mr. Gillen: Yes.

Q. Mr. Silvey, you also produced certain records of the Tracy Office of the Bank of America, in Tracy, California? A. I have.

Q. Will you produce the signature cards and ledger account for the commercial account of Helen L. Remmer for the period November 30, 1943, to March 19, 1947?

Mr. Thompson: I ask that the records produced be marked Exhibit 41 for identification, your [164] Honor.

The Court: So marked.

Q. Have you also brought with you, Mr. Silvey, the cashier's check and application therefor from the Fresno Office of the Bank of America, check No. 106963, dated February 6, 1947?

A. I have.

Mr. Thompson: I ask that this be marked Exhibit 42 for identification, your Honor.

The Court: So marked.

Q. Referring to the loan account, Mr. Silvey, in the Oakland Main Office of the Bank of America, regarding a loan to Helen Remmer and Dorothy A. Remmer, have you brought with you any other records of the bank relating to that account, other than the transcript of the account which you produced as Plaintiff's Exhibit 40 for identification?

A. I have what is commonly called a credit file.

Q. You have with you the originals of these letters?

(Testimony of Warren T. Silvey.)

A. Well, they are actually filed duplicates of original letters that were written.

Q. And the letters which you have produced, photostats of letters, relating to the credit file in connection with the loan of Mrs. Helen Remmer and Dorothy A. Remmer, are either copies of letters written by your bank in connection with that transaction or are photostats of the original letters which were received by the bank from some other sources?

A. That is correct. [165]

Mr. Thompson: I ask that that be marked 43 for identification.

Mr. Gillen: May I make this suggestion, if that is on that one loan account, I believe it would be more practical and easier to follow if it was all included in Exhibit 40.

The Court: Either that or mark it 40-A. Which would you suggest?

Mr. Gillen: Either one would be satisfactory.

The Court: It will be marked Exhibit 40-A.

Q. Mr. Silvey, have you also produced records of the Day and Night Branch of the Bank of America relating to an escrow set up at that bank in connection with the transaction between Mr. William E. Kyne and Max Silverman?

A. They are not records of the Day and Night Branch. They are records of our Trust Deposit San Francisco Main Office.

Q. Can you produce those?

Mr. Thompson: I ask that the photostats of the bank records referring to the escrow account be-

(Testimony of Warren T. Silvey.)

tween Max Silverman and Will E. Kyne be marked Plaintiff's Exhibit 43 for identification.

The Court: So marked.

Mr. Thompson: I would like to inquire whether counsel have as yet had an opportunity to examine the exhibits just marked?

Mr. Gillen: Nothing beyond 34. [166]

Mr. Thompson: Your Honor, those are all the records we have to introduce by this witness. However, he cannot be excused until counsel has had an opportunity to examine them and cross-examine.

Mr. Gillen: Then we will have to have a little time.

(Jury and alternate jurors admonished and recess taken at 2:30 p.m.)

3:00 P.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

MR. SILVEY

resumes the witness stand.

The Court: I want to explain to the jury, counsel was occupied with the examination of records. That is why we kept you so long.

Mr. Gillen: May it please the Court, the defense is prepared to stipulate that the prosecution's Exhibit 35 may be offered in evidence without objection, subject, however, to the defense's motion to strike in the event it is not properly connected up.

(Testimony of Warren T. Silvey.)

The defense will stipulate, under the same conditions, to the admission in evidence of prosecution's Exhibit 36. Also under the same conditions prosecution's Exhibit 37. Also prosecution's Exhibit 38. Also No. 39, No. 40 and No. 40-A; also to the prosecution's Exhibit 41, and that, of course, contains an Elmer Remmer signature card, so that already is connected with the defendant and would not be subject to that [167] condition that we reserved on the others. And the defense will also stipulate to the admission in evidence of prosecution's Exhibit 43, subject to the same condition, motion to strike in the event that it isn't connected up. The defense will object to prosecution's Exhibit 42 and the objection is based upon the ground that it involves a cashier's check on the Fresno Branch of the Bank of America, the check being dated February 6, 1947. The basis of the objection of the defense is that this is a date after the time period fixed in the indictment, which is through the year 1946.

The Court: Now I understand, Mr. Gillen, of the exhibits which you have just stipulated may be admitted, No. 41 is admitted without—

Mr. Gillen: Without any condition, your Honor, because it is the account of Elmer Remmer at the Tracy Office of the Bank of America and bears his signature on the signature card, so that is directly, of course, connected with the defendant.

The Court: You have heard the objection to No. 42?

Mr. Thompson: Yes, your Honor. In reference

(Testimony of Warren T. Silvey.)

to Exhibit 42, your Honor, I would like to point out that Mrs. Badovinatz—I think that is how you pronounce her name—of Fresno testified that in February of 1947 her husband told her he was going to obtain a check. We believe this particular cashier's check for five thousand dollars payable to Elmer Remmer is the check involved and that it should be received in evidence, evidencing [168] repayment of a loan which existed during the indictment time.

Mr. Gillen: Of course, your Honor, there is absolutely no basis for that in evidence. In other words, that may have represented a loan made two days before the cashier's check was made, it may have been made two weeks or a year before 1947. In other words, it may have been payment of loan made long prior to the year 1944, the opening year of the indictment, so on that basis I think at this time there is no foundation laid for the admission of that in evidence and until such foundation is laid, if it ever can be, that the objection of the defense is good.

The Court: I wonder if I could look at that check. That is 42?

Mr. Gillen: 42. While you are looking at that, your Honor, may the reporter read the last part of Mr. Thompson's statement?

(Statement read.)

Mr. Gillen: I think probably counsel used that phraseology inadvertently. There is no evidence it

(Testimony of Warren T. Silvey.)

was in payment for a loan existing in 1946. There is no evidence when the loan is made, no evidence whatever in the record.

Mr. Thompson: Your Honor, I would like to inquire whether counsel will stipulate that Exhibit 42 is a record of the Fresno Branch of the Bank of America kept and maintained in the ordinary and customary course of its business? [169]

Mr. Gillen: We will stipulate that it is an authenticated reproduction of the original check. We do not raise any technical question as to the authenticity of the reproduction.

Q. Mr. Silvey, in reference to Exhibit 37—

Mr. Gillen: It might keep the record clearer if we waited for his Honor to rule on the objection.

Mr. Thompson: Excuse me. I overlooked that, your Honor.

The Court: If I recall the lady's testimony, it seemed that this conversation occurred in February, 1947.

Mr. Gillen: That is correct, between herself and her husband alone at the time. We have the transcript if your Honor would care to see the exact answer she gave. We would like to have your Honor look at it.

The Court: Very well.

Mr. Gillen: There was some technical objection, but the pertinent testimony all appears on page 97 of the transcript. May I hand it to your Honor?

The Court: Yes. At page 95 I see this question: "Will you state at this time what the conversation

(Testimony of Warren T. Silvey.)

was that you had with your husband in February, 1947?" Then there was an objection and some discussion, and later on she testified here it was in February.

Mr. Gillen: If your Honor will note, she wasn't even asked concerning any personal knowledge she had of the circumstances and when the loan was made and there is no connection [170] in the record.

The Court: Objection will be overruled and the exhibit admitted in evidence as Exhibit 42.

Mr. Gillen: Your Honor is admitting that?

The Court: Yes, sir. My thought is that it is for the jury to determine under all the circumstances surrounding that, that the question here of the Exhibit 42 applies to that same transaction. That is my thought in the matter.

Mr. Gillen: We are not raising that point. In fact, I do not think we have any doubt that that Fresno check refers to the check mentioned by Mrs. Badovinat. Our point is this, that there is no evidence in the record to show when the loan was made and unless the loan was made within the time period of the indictment, between and inclusive of the years 1944 to 1946, then it should not be before us and we feel your Honor should not have admitted it until and unless the prosecution is able to show that it represented a loan made in 1944, 1945, or 1946. Repayment of a loan in 1947 might have been made two weeks before whatever date it was in 1947.

(Testimony of Warren T. Silvey.)

The Court: I think still that would be a question for the jury. The ruling will stand.

Mr. Thompson: Did your Honor make formal ruling on the other exhibits?

The Court: Yes, they are all admitted, all subject to a [171] motion to strike except Exhibit 41. I think that was the one that you stated, Mr. Gillen.

Mr. Gillen: We stated there was no condition placed upon that to connect it up.

The Court: The other exhibits are admitted, subject to motion to strike.

Mr. Gillen: So we may have the record clear, your Honor has admitted Exhibit 42 over our objection. May that be admitted over our objection, subject to the motion to strike in the event there is no evidence showing that the loan was made during the period of time named in the indictment?

The Court: No, I think we will let that stand the way it is, Mr. Gillen.

Mr. Gillen: We are just asking to impose the same condition as we are to the other exhibits, with the exception of 41.

The Court: However, I won't place a bar, and perhaps when it comes time to argue these motions you might develop something that will warrant me to reconsider and sustain your motion.

Q. I show you Plaintiff's Exhibit 37, Mr. Silvey, that is a cashier's check of the Bank of America, Main Office, dated August 14, 1942, to the order of the Oakland Title Insurance & Guaranty Company for five thousand dollars, check No. 25166830.

(Testimony of Warren T. Silvey.)

Were you also requested to produce the application for that [172] particular check? A. I was.

Q. Did you produce it? A. I did not.

Q. Has that application also been destroyed under the same circumstances as the application requested in connection with Exhibit 36?

A. It has been.

Q. Mr. Silvey, on an application for a cashier's check and that portion of it designating the source of the funds to be used to pay for the check, if the word "register" should appear on that blank for application, do you know what that would mean?

A. It would depend on which department the cashier's check was issued out of. There are many, many departments in a bank, and each one maintains a register.

Q. Do you know out of what department of the Oakland Main Office Exhibit 37 was issued?

A. I do not.

Q. By looking at Exhibit 37 could you determine that? A. I could not.

Q. On occasion does the loan department of the bank issue cashier's checks? A. They do.

Q. And assuming that Exhibit 37 was issued by the loan department of the bank and the word "register" appeared on the application for the check as the source of the funds paying for [173] the check, do you know what that would mean?

A. It would mean that a loan that day was registered and the proceeds of the loan paid by cashier's check.

(Testimony of Warren T. Silvey.)

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Silvey, I want you to look at the signature card in prosecution's Exhibit 41. I am handing you the prosecution's Exhibit 41 and I will ask you to look at a portion of that exhibit which is a signature card and tell us, if you will, what is indicated on there as to the date that the signature card was signed and that account opened?

A. It indicates that it was opened on January 25, 1939.

Q. And that was a commercial account, was it not?

A. That is correct.

Q. That means that that commercial account came into existence on January 25, 1939? Correct?

A. That is correct.

Q. Now there is another—I don't know whether it represents a separate card or whether it represents the reverse side of the signature card?

A. It is a separate card.

Q. There is another party's name occurring on there. What is that other party's name?

A. The signature name is E. Remmer by W. R.—

Q. Gift, isn't it? [174]

A. Gift.

Q. Now is there any way for you to tell from that exhibit whether or not there existed in the Tracy Branch of the Bank of America an earlier commercial account?

A. Prior to 1939?

(Testimony of Warren T. Silvey.)

Q. Yes. A. No, there is none.

Q. Do you mean there is no way of telling, or you can tell from that exhibit that there was no pre-existing account?

A. From the signature card I am unable to determine whether there was an account prior to January 25, 1939.

Q. So that that wouldn't indicate it was a renewal card or continuance of an old account?

A. No. This would indicate this is a new account opened for the amount of \$50 on January 25, 1939.

Q. Now on Exhibit 42, which is the Fresno Bank of America cashier's check dated February 6, 1947, can you tell us which branch that is on? With the Court's permission, I hand you Exhibit 42. Can you tell us which branch that cashier's check was issued to in Fresno? You have two or three branches in Fresno, have you not?

A. That is right. This was issued out of the Fresno Main Office.

Q. Now I would like, with the Court's permission, to show you another exhibit, Exhibit 35. I will identify that as Helen Remmer account in the Oakland Main Bank of the Bank of America; [175] is that correct?

A. No, this account was established at the Grand Lake Branch.

Q. That is right. Can you tell us when that account was opened by Mrs. Helen Remmer?

A. October 28, 1942.

Q. Mr. Silvey, you couldn't make out the open-

(Testimony of Warren T. Silvey.)

ing date of this account, Exhibit 35, from the photostat; is that correct? A. That is correct.

Q. And you looked on the original?

A. Looked on the original.

Q. The original shows October of 1942; is that correct? A. That is what I believe it to be.

Q. It is blurred on the photostat?

A. And it is a bit blurred on this.

Mr. Gillen: I think that is all; thank you.

Redirect Examination

By Mr. Thompson:

Q. Mr. Silvey, Mr. Gillen showed you Exhibit 41, which is signature card and the transcript of the account of Elmer F. Remmer in the Tracy Branch of the Bank of America. What are the two small cards making up part of that exhibit?

A. The first is a signature card covering the conditions under which the account is maintained, and the authorized signature to withdraw the funds from that account.

Q. On that signature card how many authorized signatures were indicated? [176]

A. There was one.

Q. Whose signature is that?

A. Elmer F. Remmer.

Q. What is the second small card making up part of that exhibit?

A. That is what is called an authorization card.

Q. What is the purpose of it?

(Testimony of Warren T. Silvey.)

A. For mailing of statements and cancelled checks and for the return of deposited items that may have been deposited in the account and had been returned unpaid to the account and for service charges under certain scheduled conditions.

Q. And that is the card that is signed Elmer Remmer by W. R. Gift? A. That is right.

Q. Was any one other than Elmer F. Remmer authorized to draw checks on this account at any time? A. At no time.

Mr. Thompson: That's all.

Recross-Examination

By Mr. Gillen:

Q. I wonder would you be kind enough to look at, with the Court's permission, the original signature card of Exhibit 41? Mr. Silvey, you testified, in looking at the photostat, that it appeared to you that the account had been opened with a deposit of \$50. I will ask you to look at the original and see if the account wasn't opened with an initial deposit of \$150? A. Yes. [177]

Q. So the original card shows it was opened with an initial deposit of \$150 instead of \$50 which you stated in looking at the photostat; is that correct? A. That is correct.

(Witness excused.)

DANA E. BREMNER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Dana E. Bremner.

Q. Where do you live?

A. 6326 Roanoke Road, Oakland, California.

Q. What is your employment?

A. Oakland Title & Guaranty Company, Oakland.

Q. How long have you been employed by the Oakland Title Insurance & Guaranty Company in Oakland, California?

A. About 15 years.

Q. Are you appearing here today pursuant to a subpoena served upon the Oakland Title Insurance & Guaranty Company?

A. I am.

Q. Have you brought with you certain of the business records of that company called for in the subpoena?

A. Yes, sir.

Q. Will you produce the records of the Oakland Title Insurance & Guaranty Company relating to an escrow No. 312404? [178] Mr. Bremner, the record you have produced has been marked Plaintiff's 44 for identification. I would like to ask you whether those records are records kept and maintained by the Oakland Title Insurance & Guaranty Company in the usual, regular and customary course of the operation of its business?

(Testimony of Dana E. Bremner.)

A. They are.

Q. Is it part of the business of the Oakland Title Insurance & Guaranty Company to act as escrow agent in real estate transactions?

A. Yes, it is.

Q. Is it also part of the business of the Oakland Title Insurance & Guaranty Company to keep and maintain records of the character comprising Exhibit 44 for identification?

A. We keep the actual records.

Q. And it is part of the business to keep those records? A. Oh, yes.

Mr. Thompson: I offer Exhibit 44 for identification in evidence, your Honor.

Mr. Gillen. If we may have your Honor's permission to confer for a moment off the record with counsel for the prosecution?

The Court: I might say the witness suggested a few moments ago there might be matters in there that are not pertinent.

(Off - the - record conference between [179] counsel.)

Mr. Gillen: May it please the Court, in the interest of not cluttering up the record with voluminous matter that has no reference to any matter we are interested in here—that is, title refers to predecessors in interest—we would be willing to stipulate that Mr. Bremner may testify from the record to any matters that the prosecution feels is pertinent and, of course, subject to our motion to strike if it is not pertinent.

(Testimony of Dana E. Bremner.)

The Court: Is that satisfactory?

Mr. Thompson: Satisfactory, your Honor.

Q. Mr. Bremner, will you refer to the record you have brought and state generally the nature of the transaction reflected in those records?

A. It is the sale of real property.

Q. Who is the seller?

A. The sellers were James M. Stevens and Betty Ann Stevens, his wife.

Q. Who were the buyers?

A. Helen L. Remmer, a married woman, and Dorothy A. Remmer, a single woman.

Q. What is the description of the property?

A. Do you wish me to read the entire description?

Q. Just the lot and block number and location.

A. Real property in the County of Contra Costa, State of California, described as follows: Portion of Lot 83 as shown on the map of sectionalization of a part of Ranch Laguna de la Palos Colorado, Contra Costa County, California.

Q. Does anything in your files show the common designation for that portion of parcel, such as street number?

A. No, none.

Q. And what was the date of the transaction?

A. There are a number of dates. Do you mean the date it was consummated?

Q. Yes, that would be satisfactory.

A. The deed was recorded August 26, 1942.

Q. And the deed you refer to is the deed from

(Testimony of Dana E. Bremner.)

Mr. and Mrs. Stevens, the sellers, to Helen Remmer and Dorothy A. Remmer, is that correct?

A. Correct.

Q. What is the purchase price for the property?

A. Nineteen thousand dollars.

Q. And from whom did the Oakland Title Insurance & Guaranty Company receive the money to pay the purchase price?

A. The receipt was made out to Mrs. Elmer Remmer although it is signed Helen Remmer, and Dorothy A. Remmer. Fourteen thousand dollars was received from Helen Remmer and five thousand dollars was received from the Bank of America, Oakland Home Office.

Q. Referring to the \$14,000 payment, do your records indicate the form that the payment took, that is, whether it was cash or by check?

A. Yes, it was a cashier's check.

Q. And do your records show the number of the cashier's check?

A. Yes, it was No. 25166567 on the Bank of America, Oakland Main Office.

Q. What form did the payment of the \$5,000 take?

A. The \$5,000 was cashier's check No. 25166830 from the Bank of America, Oakland Main Office.

Q. From whom did you receive instructions on behalf of the purchaser regarding the sale of the property?

A. The parties I mentioned as having signed

(Testimony of Dana E. Bremner.)

that receipt. That was our instructions from Helen Remmer and Dorothy A. Remmer.

Q. Do your records show whether or not the buyers, or one of them, occupied the property at any particular time?

A. No. The buyers you say? I beg your pardon.

Q. Yes.

A. Yes, there is a notation set forth in these papers: "Premises occupied by purchasers on August 18, 1942. Per Wallace." The initials under that are C. M.

Q. And do your records show anything regarding where the buyers had lived prior to making this particular purchase?

A. The address given by the buyers when we took their escrow instructions was 1607 West Walnut Street, Stockton, California.

Q. Does it show how long they had lived there?

A. Yes, it was since 1939.

Q. In connection with the transaction, what costs were paid by [182] the buyers?

A. I don't know exactly how to answer that because the buyers did not actually pay the cost themselves. It was paid by the bank.

Q. What costs were paid on the part of the buyers?

A. Fire insurance pro-rated, \$43.14. Title insurance premium, \$112.50; war risk insurance, \$15.00; recording quit-claim, \$1.30; recording deed, \$1.30; recording deed of trust, \$3.90. That was a total of \$177.14. As against that there was a credit

(Testimony of Dana E. Bremner.)

of \$10.95 for tax pro-rated, making a total of expense of \$166.19.

Q. So the total amount that the title company received from the buyers in connection with the purchase of this property was how much?

A. That would be \$14,166.19.

Q. And the additional five thousand dollars was received from the bank?

A. Yes, that was proceeds for the real estate loan.

Q. And it was a payment on behalf of the buyers? A. Right.

Q. The total purchase price for the property was 19 thousand dollars? A. Correct.

Q. And what the buyers paid you, either directly or by loans on the property, was \$19,000 plus the costs which you related?

A. That is right. [183]

Q. On what dates were the payments made to the title company by the buyers, or on their behalf?

A. The fourteen thousand dollars I referred to was paid to us on August 14, 1942. The five thousand dollars from real estate loan was paid to us August 20, 1942, and the expense bill of \$166.19 was paid on August 24, 1942.

Q. Has that particular parcel of property been sold by Helen Remmer—

A. (Interceding): That was an error, I beg your pardon. That must be an error because that was two days before the transaction was closed. September 24th, not August. I read it wrong.

(Testimony of Dana E. Bremner.)

Q. Which payment was paid on September 24?

A. \$166.19.

Q. Has that particular parcel of property been sold by Helen Remmer and Dorothy Remmer?

A. Yes, it has.

Q. On what date?

Mr. Gillen: I don't know, first of all, whether that would be competent, relevant and material, and I think the time on it would be prior to the time we are interested in here. May we see the paper?

A. Yes, certainly. (Witness hands paper to defense counsel.)

Mr. Gillen: We offer the objection, may it please the Court, it is incompetent, irrelevant and immaterial, involves a transaction which commenced in 1942 and ended at some subsequent time [184] to the time involved here. We think it is incompetent, irrelevant and immaterial.

The Court: Objection will be overruled as to this question and see what the answer is. Read the question to the witness.

(Question read—On what date?)

The Court: Now you can answer that question, Mr. Bremner.

A. January 14, 1948.

Q. I don't believe I asked you, Mr. Bremner, the form of payment of the sum of \$166 and some odd dollars, representing the costs paid by the buyers?

(Testimony of Dana E. Bremner.)

A. It was by credit to our account by the bank.

Q. And what bank was that?

A. Bank of America, Oakland Main Office.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Bremner, if you look again at the original escrow transaction, No. 312404, which showed the sale from the Stevens to Helen Remmer and Dorothy A. Remmer, do you have that before you, sir? A. Yes.

Q. Is there a reference there to a quit claim from Elmer F. Remmer to Helen L. Remmer, his wife? A. Yes, there is.

Q. And when was that executed, sir? [185]

A. August 14, 1942. Wait a minute—I beg your pardon—the abstract of that deed the first name is Alma F. Remmer.

Q. What does the abstract show?

A. Alma.

Q. What does the other document show?

A. That was a mistake. I have an abstract of the document from our abstract department and this would be correct, deeded by Elmer F. Remmer, husband, to Helen L. Remmer, his wife, a married woman, and Dorothy A. Remmer, a single woman.

Q. In other words, the effect of that instrument executed by Elmer F. Remmer was to deed any interest he might have in that property to his wife

(Testimony of Dana E. Bremner.)

and to make it her separate property, is that correct.

Mr. Thompson: We object to that, calls for conclusion of this witness as to the effect of a legal instrument.

The Court: Objection sustained.

Q. Let me ask you this—withdraw that and I will ask you this question. You have stated that you have been connected with the Oakland Title Insurance & Guaranty Company for a period of 15 years last past, is that correct?

A. That is correct.

Q. That has been continuous?

A. Except for a brief period during the war.

Q. Are you also a lawyer?

A. That is correct. [186]

Q. And you handle these escrow matters and transactions, transfers of real property, is that correct?

A. That is correct.

Q. What effect does your company give to the filing of record of a quit-claim deed from a husband to a wife with reference to interest in a piece of real property? That would be, of course, in California?

A. In this particular case it was for the purpose of perfecting a joint tenancy.

Q. A joint tenancy between whom?

A. Between the two purchasers, Helen Remmer, a married woman, and Dorothy A. Remmer, a single woman.

Q. In other words, the purpose of obtaining that

(Testimony of Dana E. Bremner.)

quit claim deed was to effect a joint tenancy so that Helen Remmer, although she was married, would have that as her undivided separate property and not affected by the community property laws of California, is that right?

A. That is right.

Mr. Gillen: I think that is all.

The Court: Any reason why this witness could not be excused?

Mr. Thompson: No, your Honor, but the exhibit is for identification and at the conclusion of the trial if we found it was not needed, it will be returned to this witness, but in the event we should require it later on we would like it to [187] be available.

(Witness excused.)

The Court: I think it well for us to adjourn at this time so we may avoid, as much as possible, any danger of accidents on the highway, due to icy conditions which perhaps might exist, so we will adjourn now.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [188]

Tuesday, December 4, 1951, 10:00 A.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

RONALD SAUNDERS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Ronald Saunders.

Q. Where do you live?

A. 9301 Skyline Boulevard, Oakland.

Q. What is your employment?

A. Alameda County East Bay Title Insurance Company.

Q. Where is the Alameda County East Bay Title Insurance Company located?

A. 15th & Webster.

Q. In Oakland, California? A. Yes.

Q. What is your business with that company?

A. That is a hard one—public relations.

Q. Have you appeared in court today pursuant to subpoena served on the Alameda County East Bay Title Insurance Company? A. Yes, sir.

Q. And you have brought with you certain of the records of that company relating to escrow transactions? [189] A. Yes, sir.

Q. Will you produce the records of the Alameda County East Bay Title Insurance Company re-

(Testimony of Ronald Saunders.)

lating to escrow No. 335148? Mr. Saunders, I show you the records which you have produced, which have been marked Plaintiff's Exhibit 45 for identification. Are those records of the Alameda County East Bay Title Insurance Company kept and maintained in the ordinary, usual, and customary course of the business of the company? A. They are.

Q. And is it part of the business of the Alameda County East Bay Title Insurance Company to keep and maintain records of the character which you have produced? A. It is.

Q. Is it part of the business of the Alameda County East Bay Title Insurance Company to act as escrow agent for real estate transactions?

A. Yes, sir.

Mr. Thompson: I offer Exhibit 45 for identification in evidence, your Honor.

Mr. Gillen: May it please the Court, I would like an opportunity to examine the witness on voir dire as to the basis for possible objection.

The Court: You may do so.

Q. (By Mr. Gillen): Mr. Saunders, you say your connection with the Alameda County East Bay Title Insurance Company is that of [190] public relations? A. Partly, yes, sir.

Q. Now public relations man, in the common sense of the word, is a publicity director and one who creates good public relations or good will between his company and those with whom the company deals, is not that correct?

A. That's right, sir.

(Testimony of Ronald Saunders.)

Q. And that is your job, is it?

A. I said partly. I also have, and have had, charge of all escrows. I mean open escrows, assigning of the escrows.

Q. Do you have charge of escrow records?

A. Yes, sir.

Q. Do you prepare those records yourself?

A. No, sir.

Q. They are prepared by the counter man, are they not? A. That's right, sir.

Q. So that you are not familiar with the escrows that are prepared by the counter men other than you know there are records kept, is that correct? A. Correct. I am no expert.

Q. Well, I am not asking for that qualification. I am asking for personal knowledge of the records. You have no personal knowledge of the records of your company other than records are kept in the ordinary course of the title insurance company's business, is that correct? [191]

A. That is correct.

Q. And the major portion of your work is public relations, is that so? A. That is right.

Q. Do you hold any particular official title with the company? A. No.

Q. So the particular file that you brought, you were not familiar with other than it is a file kept in the company's office, your company's file?

A. That's right.

Mr. Gillen: Well, may it please the Court—

(Testimony of Ronald Saunders.)

Mr. Thompson (Interrupting): If the Court please, I think I am entitled to ask additional questions on voir dire.

The Court: You may.

Q. (By Mr. Thompson): Mr. Saunders, are you familiar with the character of records kept and maintained in the escrow department?

A. Yes, sir.

Q. And you know how escrow transactions are handled by the Alameda County East Bay Title Insurance Company? A. That's right, sir.

Q. Are you able to understand the various documents that are contained in an escrow file?

A. Yes.

Mr. Gillen: Of course I think that question is both [192] leading and suggestive and also calling for a man to pass upon his qualifications, like saying, how smart are you?

The Court: Let me have the question, please.

(Question read.)

The Court: I will sustain the objection.

Q. What did you say your duties were in connection with the escrow department?

A. When an order is placed with the company, it is given a number. I partly index those and assign them, if they haven't already been assigned, to the escrow officers and public relations.

Q. And you act in a supervisory capacity over the escrow officers in assigning transactions to them? A. No, sir.

(Testimony of Ronald Saunders.)

Q. How long have you been employed by the Alameda County East Bay Title Insurance Company? A. The last six years.

Q. In what department of the company have you worked?

A. I worked in the tax department and public relations and the open escrow account.

Q. And were you designated by anyone in the company to produce these records to court pursuant to the subpoena issued? A. Yes, sir.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. It would be for the Court to determine whether this [193] man is qualified to interpret the records of the company.

The Court: I think he can answer this question.

(Question read.)

A. Yes, I was.

Q. By whom?

A. Mr. Sanborn, manager of the company.

Mr. Thompson: That is all.

Mr. Gillen: May it please the Court, I submit to the Court this witness does not qualify as either the person who prepared the records, the person who keeps the records, the person who is familiar with the details of the records, or the person who has sufficient knowledge of the transacting of escrow matters in a title company to be able to qualify himself to interpret the records that he has brought here. The witness himself has stated his work primarily is that of public relations man,

(Testimony of Ronald Saunders.)

which is another way of saying publicity man, and also that he does some administrative work in the matter of assigning to counter men escrow transactions that come in and I submit the man is not qualified to interpret, from his own testimony, those transactions, either from personal knowledge or general knowledge, by reason of his position with the title company.

Mr. Thompson: Your Honor, I do not know of any question directed to the witness asking him to interpret anything. The subpoena, as the record shows, was served on the company [194] itself. This witness has testified these records are records kept in the regular course of the business of the company and part of the business of the company to keep these records. We have offered the records in evidence as evidence of the transactions rather than the testimony of any witness.

Mr. Gillen: What we have in mind, your Honor, as the basis for this objection, if we have a witness who produces records and is not qualified to interpret them, we are deprived of the right to cross-examine someone with knowledge of the meaning of the particular records and it is like giving a publicity man from a chemical company a chemical formula and asking him to come in and interpret it.

Mr. Thompson: Your Honor, the records are the best evidence. They speak for themselves, what they contain and what their legal effect is.

The Court: It seems to me a subpoena of this kind should be directed in general terms to the organization or institution with the thought that

(Testimony of Ronald Saunders.)

they send up somebody who has custody or knowledge of the records. Now this is the second instance here in this case where we are called upon to stretch Section 1732 of the Code. This insurance man who testified to these insurance policies of certain personal property. I had a list of witnesses furnished me by the clerk and his name did not appear on the list of [195] witnesses, but the party who he informed us had knowledge and custody of the records, that name did appear, some lady, a partner in the insurance broker's office. That exhibit would be on much sounder ground if it had been introduced through testimony of that witness rather than the insurance man who testified here. Now here we have the same instance here. They were called upon to designate someone to bring up these records. It seems to me that they should have sent up somebody who has direct knowledge.

Mr. Gillen: That was Mr. Scollin, the insurance brokerage firm.

The Court: Yes, that is the man.

Mr. Thompson: I believe your Honor incorrectly recollects the situation. Mr. Scollin was a partner in the insurance firm which he represented.

The Court: His knowledge of that exhibit was very meager.

Mr. Thompson: I believe your Honor refers to Mr. Hill.

The Court: On this list of names is the name of Mrs. Bridgeford and during the course of Mr. Scollin's testimony it was made to appear that

(Testimony of Ronald Saunders.)

this lady had knowledge of this particular record and would have been the proper person to be sent up here by the [196] company. It looks as though we have the same situation here. I think we ought to be a little careful about the use of this Section 1732. I think the defendant is entitled to have any records presented through persons who have some knowledge of the record and have had some charge of its custody.

Mr. Thompson: I believe this witness testified he did have some control and supervision of the records, your Honor.

The Court: He testified he gave it a number, something of that kind. Now this Section 1732 is a pretty broad section, but I do not believe it should be stretched out of proportion. (Reads Section 1732) Now I think the effect of this witness's testimony is that he did testify that particular record, Exhibit 45, was a record kept in the regular course of business by the institution he represents and, Mr. Gillen, it seems to me that we have compliance with that section, but I do feel that the defendant is entitled to have these records produced by somebody who really knows something about them, and that is the thought I had when I heard the testimony of this gentleman, Mr. Scollin.

Mr. Thompson: In that connection, your Honor, I would like to suggest that these records are as readily available to the defendant as they are to the government. If they require [197] any explanation of the witness to explain them, it is as readily

(Testimony of Ronald Saunders.)

available to the defendant as it is to the government.

The Court: Well, I wish if you are going to have any more exhibits of this nature, if possible you should get a representative of the firm or corporation who really has some knowledge of the documents. I will overrule the objection and admit the exhibit. I do that because I think they come within that section, Mr. Gillen, but I think it would be better if they would have these records produced by someone who had the custody.

Mr. Gillen: May it please the Court, as in the instance of the other title record that was referred to yesterday, I note in this file No. 335148 there is considerable immaterial matter that does not relate to any transaction that would affect the defendant in this case or any of the defendant's business affairs and for that reason I suggest that those be extracted from the record before they are introduced in evidence—reference to other people in the chain of title.

The Court: Can you agree with counsel as to matters that come within that category?

Mr. Thompson: Your Honor, it is difficult to do that. This is file pertaining to this particular escrow and I think we might have some difficulty in agreeing what is material and what is immaterial and it is clear that immaterial matters [198] harm anybody.

Mr. Gillen: Other persons, predecessors in in-

(Testimony of Ronald Saunders.)

terest, those things shouldn't clutter up the record, your Honor, prior owners, and so on.

Mr. Thompson: It is my understanding the exhibit is in evidence, your Honor.

The Court: Well, there has been a request made. I did admit it but I will withdraw the ruling and see if *cannot* get the immaterial matter out of it, if there is immaterial matter in it.

Mr. Gillen: We might do it this way, possibly counsel could extract from that record what he considers material. We could meet that as he introduced that. Possibly we could agree on it, then he could introduce it.

Mr. Thompson: We have three or four other escrows. I suggest, your Honor, we have them marked for identification and then we can get together and agree what to abstract and what is material.

Mr. Gillen: All right.

The Court: All right.

Q. Will you produce escrow No. 337802?

The Court: I ask that the records produced by the witness concerning escrow No. 337802, be marked Plaintiff's Exhibit 46 for identification.

The Court: So marked. [199]

Q. Will you produce escrow No. 311361.

Mr. Thompson: I ask that these records produced by the witness be marked Exhibit 47 for identification.

The Court: So marked.

Q. Will you produce escrow No. 342181?

(Testimony of Ronald Saunders.)

Mr. Thompson: I ask that these records be marked Exhibit 48 for identification.

Q. Will you produce the records of escrow No. 350504?

Mr. Thompson: I ask that these records be marked Exhibit 49 for identification.

The Court: Have you completed that list now?

Mr. Thompson: Yes, your Honor. I suggest that we take a recess and perhaps counsel can agree.

Jurors and alternate jurors admonished and recess taken at 10:30.

11:20 A.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

Jury and alternate jurors admonished and noon recess taken at 11:23.

Afternoon Session—December 4, 1951, 1:30 P.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

MR. SAUNDERS

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Gillen: May it please the Court, it is my understanding—correct me if I am in error—that

(Testimony of Ronald Saunders.)

the early recess granted by your Honor today was to comply in this, that the prosecution has taken from the exhibits offered for identification certain data which the prosecution considered material and the defense has no objection to that data going into evidence; however, each exhibit subject, of course, to our right to move to strike in the event it isn't connected up. Now as to the other portions, which I think are generally agreed to be supervisal, have no materiality, no connection with this matter, I understand it is the desire of the prosecution that those exhibits be marked for identification and remain in custodial charge in the event anybody in the future may wish to use them. Mr. Thompson, is that correct?

Mr. Thompson: That is generally correct, Mr. Gillen. At this time I would like to have the portion of Exhibit 45 for identification, which I am handing the clerk, marked Exhibit 45-A for identification.

The Court: Very well. It may be marked Exhibit 45-A. That is the portion you do not intend to offer in evidence at this time?

Mr. Thompson: At this time.

Mr. Gillen: That is the portion to be eliminated from evidence at this time. [201]

Mr. Thompson: At this time we offer in evidence Plaintiff's Exhibit 45 for identification.

Mr. Gillen: No objection.

The Court: It may be admitted.

(Testimony of Ronald Saunders.)

Mr. Thompson: Exhibit 45 is received in evidence, your Honor?

The Court: Yes.

Mr. Gillen: And 45-A for identification.

Mr. Thompson: We have removed certain documents from Exhibit 46 which we ask to have marked Exhibit 46-A.

The Court: So marked.

Mr. Gillen: That is for identification?

The Court: Yes.

Mr. Thompson: At this time we offer in evidence Plaintiff's Exhibit 46.

Mr. Gillen: No objection, subject to the condition we have stated.

The Court: It may be admitted.

Mr. Thompson: Your Honor, we have removed from Plaintiff's Exhibit 47 for identification certain documents which we ask to have marked Exhibit 47-A for identification.

The Court: So marked.

Mr. Thompson: At this time we offer in evidence Exhibit 47.

Mr. Gillen: No objection. [202]

The Court: It may be admitted.

Mr. Thompson: Your Honor, we have removed from Plaintiff's Exhibit 48 for identification certain documents, which we ask to have marked Plaintiff's Exhibit 48-A for identification.

The Court: So marked.

Mr. Thompson: We offer in evidence Plaintiff's Exhibit 48.

(Testimony of Ronald Saunders.)

Mr. Gillen: No objection.

The Court: It may be admitted.

Mr. Thompson: We have removed from Plaintiff's Exhibit 49 for identification certain documents, which we ask to have marked Plaintiff's Exhibit 49-A for identification.

The Court: So marked.

Mr. Thompson: We now offer in evidence Plaintiff's Exhibit 49.

Mr. Gillen: No objection.

The Court: It may be admitted.

Q. Mr. Saunders, you have produced in court certain records of the Alameda East Bay Title Insurance Company, which have been marked Plaintiff's Exhibits 45, 45-A, 46, 46-A, 47, 47-A, 48, 48-A, 49, and 49-A. As to all of those exhibits, are those records of the Alameda County East Bay Title Insurance Company? A. Yes, sir.

Q. Which were kept, made and maintained in the regular course [203] of the business of that company?

Mr. Gillen: Objected to as having been asked and answered.

Mr. Thompson: Not as to all exhibits.

Mr. Gillen: I withdraw the objection.

Mr. Thompson: I just ask the general question.

A. Yes, sir.

Q. As to all those exhibits, are those records which it was the business of the Alameda County East Bay Title Insurance Company to keep and maintain? A. Yes, sir.

(Testimony of Ronald Saunders.)

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Saunders, directing your attention to prosecution's Exhibit 45, and particularly the document in these which appears to be in mimeograph form, I will ask you to look at this—with the Court's permission, I will hand it to you—and tell us whether or not you recognize that form as a mimeographed form used by your company?

A. Yes, sir.

Q. And it is true, is it not, that it is used so frequently and commonly that you have a regular mimeographed form for that purpose?

A. Yes.

Q. Now this mimeographed form is a form where persons having their real estate transactions, transfer of realty, request that [204] the title company keep the title in its name, is that correct?

A. Yes, sir.

Q. I will ask you, with the Court's permission, to look at the other exhibits, exhibits through 49, and tell us whether or not you find the same mimeographed forms directing or authorizing the title company to keep the title in its name? I do not think you will find it in 49, but I think up to 48.

A. In Exhibit 46 there is an unexecuted form.

Q. Would you just glance at the others. Tell us whether or not those same forms occur in the others?

A. Yes, sir.

(Testimony of Ronald Saunders.)

Q. By the way, in looking at that, any other instances where the unexecuted forms appear, such as in 46? Does unexecuted mean that the direction was not signed by anybody? That referred to 45, Exhibit 45, did it not, referred to the same kind of action? A. I do not have 45.

Q. I have 45 down here, I am sorry.

A. Yes, sir.

Q. Refers to the same transaction?

A. Exhibit 45; yes, sir.

Mr. Gillen: With the Court's permission, I should like to read this particular form to the jury.

The Court: Yes, sir.

Mr. Gillen: This is dated February 15, 1945, under date [205] of Oakland, California. It is the mimeographed form which Mr. Saunders has identified as the form prepared and used by his company in instances where persons, in participating in a real estate transfer, desire the title company to retain the title of the property in the name of the title company. It reads: (Reads from Exhibit.) And thereafter is description of the land on the form, which is unnecessary to read, and the signature line bearing the purported signature of Joseph C. Haughey.

That is all, thank you.

Redirect Examination

By Mr. Thompson:

Mr. Saunders, will you refer to Plaintiff's Exhibit 45 and give the description of the property

(Testimony of Ronald Saunders.)

you are holding under that escrow, just the lot numbers and block number and county.

A. Lot 4, Block 104, as designated on the map entitled "Richmond Annex Addition, Contra Costa County, California."

Q. And is the Alameda County East Bay Title Insurance Company holding title to that property under one of the holding agreements which was read by Mr. Gillen?

A. You didn't give the correct title.

Q. What is the correct name?

A. Alameda County East Bay Title Company.

Q. Thank you. A. We are.

Q. And for whom are you holding the property?

A. It is signed Joseph C. Haughey. [206]

Q. Mr. Saunders, will you refer to Plaintiff's Exhibit 46 and give the description of the real property involved in that escrow?

A. Lots 11 and 21 in Block 104, as designated on the map entitled, "Richmond Annex Addition, Contra Costa County, California."

Q. Is the Alameda County East Bay Title Company holding title to that property under one of the holding agreements? A. Yes, sir.

Q. For whom? A. Joseph C. Haughey.

Q. I also show you Plaintiff's Exhibit 47. Will you please give the description of the property involved in that escrow?

A. Lots 5, 6, 7, 8, 9, and 10 in Block 104, as designated on the map entitled "Richmond Annex Addition, Contra Costa County, California."

(Testimony of Ronald Saunders.)

Q. Is the Alameda County East Bay Title Company holding title to that property under one of the holding agreements? A. Yes, sir.

Q. For whom? A. Joseph C. Haughey.

Q. I also show you Plaintiff's Exhibit 48. Will you give the description of the property involved in that escrow?

A. It is a long description. Would you like it in full?

Q. Can you give it by lot designation and [207] block?

A. Parcel 1, Lot 17 in Block 104, as designated on the map entitled "Richmond Annex Addition, Contra Costa County, California," and parcel 2, a portion of Lot 20 in Block 104, as designated on the map entitled, "Richmond Annex Addition, Contra Costa County, California," and there are metes and bounds description.

Q. That is sufficient. Is the Alameda East Bay Title Company holding title to that property under one of the holding agreements? A. Yes, sir.

Q. For whom? A. Joseph C. Haughey.

Mr. Thompson: That is all.

Mr. Gillen: No further questions.

(Witness excused.)

JOSEPH C. HAUGHEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Joseph C. Haughey.

Q. Where do you live?

A. 2200 16th Avenue, San Francisco.

Q. What is your business or occupation?

A. Attorney at law. [208]

Q. In the City of San Francisco?

A. Yes.

Q. Were you in the courtroom during the testimony of Mr. Saunders? A. I was.

Q. And did you hear read here the holding agreement with respect to Lots 4, 5, 6, 7, 8, 9, 10, 11 and 21 of Block 104, Richmond Annex Addition, Contra Costa County? A. I did.

Q. Are you the same individual named in that holding agreement? A. I am.

Q. As being the person for whom the title company is holding that property? A. I am.

Q. Will you relate the circumstances under which that property is being held for your direction?

A. Well, I will have to call upon confidential relationship that exists between myself and the party for whom I worked. I am unable to testify unless my client waives, I mean the party I was working for at that time.

(Testimony of Joseph C. Haughey.)

Q. By that to whom do you refer?

Mr. Gillen: May it please your Honor and Mr. Campbell, we will waive, on behalf of the defendant, Elmer Remmer, the confidential relationship of attorney and client which binds [209] Mr. Haughey and permit Mr. Haughey to testify fully.

Mr. Haughey: As further protection for me, I would like Mr. Remmer to waive that personally.

Mr. Gillen: Will you waive the confidential relationship binding Mr. Haughey, Mr. Remmer?

Mr. Remmer: I waive it.

Q. Very well, proceed to relate the circumstances.

A. In either April or May, 1943, Mr. Remmer was interested in some property in El Cerrito, Contra Costa County, which is across the Bay from San Francisco. He had made arrangements for the purchase from Stanley Parsons, located on San Diego Street—I don't recall the other streets—and it is my recollection he picked me up in San Francisco and drove me over to the Bank of America, 12th & Broadway, and on the way over he told me that he was buying this property, this building on it, contained a bar, and that although he was buying it, he didn't want to have it in his own name.

Q. Did he state why he did not?

A. Yes, he said he was getting interested in a gambling venture in El Cerrito and there was some jealousy among other people that came up there to operate there at the time and he thought, in order

(Testimony of Joseph C. Haughey.)

to make it easier for himself to operate there, he would prefer that his name not be in the title, so at my suggestion—I told him, I said, “There is no problem to that. Much property in San Francisco is held in the name of title companies,” for various reasons, to evade real estate brokers coming around and bothering the rightful owner; sometimes four or five people are interested in a parcel and as a matter of convenience have it put in the name of a title company, and I told him it could be done very easily, all he would have to do is to instruct the title company to put this property in the title company’s name, subject to my instructions or my wife’s instructions or anyone’s instructions and he thought that was best to do and he told me, he said, “Well, let’s put it through that way.” So we proceeded to the bank and we entered the officer’s quarters——

Q. (Interceding): Have you related all the conversation you had at that time?

A. As best I can recollect it.

Q. That is all that you recall at this time?

A. That is all I recall at this time.

Q. Was anything said in that conversation with respect to whether or not the property would then appear on the tax rolls in the name of the real party in interest?

A. I don’t recall that was even mentioned.

Q. You have no recollection?

A. No recollection.

Q. Very well, proceed.

(Testimony of Joseph C. Haughey.)

A. So we proceeded to the Bank of America at 12th & Broadway and Mr. Remmer was greeted by one of the officers and [211] apparently was a friend of long standing——

Q. Mr. Haughey, you are an attorney, you understand that you are to relate what took place and not your impression.

A. Well, two or three other gentlemen came over and conversed with Mr. Remmer, employees of the bank, I think and a couple of other officers, at least one was an officer, his name was Bill Fitzmaurice—I think he has since died——

Q. (Interrupting): Very well.

A. And after we were there maybe 15 minutes, Mr. Fitzmaurice handed over to Mr. Remmer some cash, which Mr. Remmer put in his pocket and we proceeded to the Alameda County Title Company, which is three or four blocks from the bank.

Q. In what form was that cash?

A. Currency.

Q. Was it a large roll or a small roll of bills?

A. As I recall, he put it in a side pocket and we walked along and that is all the regard he had for it at the time—he just put in a side coat pocket. So we went up to the title company and I introduced myself to one of the counter men and told them there was an escrow—I think the escrow was already established by Mr. Parsons.

Q. Mr. Parsons was the seller?

A. Yes. Told him that we were there to complete the deal and I had the money and Mr. Remmer

(Testimony of Joseph C. Haughey.)

handed me the money. I don't know whether the counter man saw him give it to me or not, but [212] I told him I had the funds, I paid over the money to the counter man and signed the one that pertained to that particular deal, sale by Parsons to Remmer.

Q. That is referring to the holding agreement.

A. I am assuming you have one, Mr. Campbell, without referring to it.

Q. How much money did you hand over to the title company on that occasion?

A. It is my recollection 25 thousand dollars. I may be in error, but the tax for it itself will show what the amount was.

Q. Yes, all right. I am going to show you at this time Plaintiff's Exhibit 45, and referring particularly to the holding agreement.

A. This one is dated 1945. I think there is an earlier one than this. The original transaction is 1943.

Mr. Gillen: It is Exhibit 47, Mr. Campbell.

Q. There was more than one transaction, was there not?

A. Yes, I think all told three or four.

Q. I will hand you all three exhibits.

A. I will take one at a time.

Q. So you may examine as to——

A. In connection with the one here identified as Plaintiff's Exhibit 45, bearing date of February 15, 1945——

Q. Pardon me, Mr. Haughey, if you will ex-

(Testimony of Joseph C. Haughey.)

amine the three and refer to the one in which you referred in your testimony where [213] you paid the 25 thousand dollars. I think that is No. 47.

A. Yes, Stanley N. Parsons and Clara E. Parsons, his wife. This is dated May 3, 1943. No, that is the statement of the title company—April 27th—I think 26th, originally written April 27, 1943. It was 24 thousand dollars paid at that time, apparently.

Q. If you examine the file you will find a thousand dollars deposit had already been made, is that correct? A. That is right.

Q. That is the first transaction which you had of that nature? A. Yes, that is right.

Q. And that covers what lots?

A. Lots 5, 6, 7, 8, 9 and 10, Block 104.

Q. All right, sir. Are you familiar with those premises yourself?

A. Just generally. I usually see that at night time, probably three different times.

Q. Do you know what was located at that time on those premises?

A. Yes, there was a night club and bar there at one time.

Q. Under what name?

A. At one time—I don't know the sequence of it at all—one time 21 Club and another time the 90 Club.

Q. Now will you turn to the next transaction, which I believe is Exhibit 46. [214]

A. Yes, sir.

(Testimony of Joseph C. Haughey.)

Q. Was that a similar transaction?

A. It was.

Q. And when was that transaction had?

A. It looks like the escrow was established March 24, 1945.

Q. And did you handle the details of that transaction in exactly the same fashion, or similar fashion, to that which you have described?

A. No, I did not. I see the instructions are signed by Robert Lincks.

Q. Who is he? A. I don't know.

Q. Is he not the real estate agent involved in the transaction? A. I don't know who he is.

Q. That holding agreement was also executed with relation to that?

A. On April 27, 1945, I directed a letter to the Alameda County State Title Insurance Company, 14th & Franklin, attention Mr. Calvert, re escrow No. 337802, which was the escrow established by Mr. Lincks, and that relates, part of the letter says—do you want me to read it in evidence?

Q. No, state the effect of it.

A. (Reads): "Further that you forward to me your usual holding agreement to convey title only upon instruction of the undersigned, Joseph C. Haughey * * * ." Signed by myself, Joseph [215] C. Haughey.

Q. So that property is also being held under holding agreement? A. That is right.

Q. What is the consideration paid?

A. According to the letter, four thousand five

(Testimony of Joseph C. Haughey.)

hundred sixty, to be disposed in accordance with instructions left with you by Robert Lincks.

Q. Who furnished those funds?

A. I don't recall how the money was received, whether cash or check or how it was paid.

Q. For whom were you holding that property?

A. Elmer Remmer.

Q. Now, will you refer to Exhibit 45?

A. Yes.

Q. Is that also being held by the title company, that is, the title, under instructions from you?

A. Yes.

Q. Under a similar arrangement?

A. Yes, February 8, 1945, I enclosed cashier's check.

Q. What was the amount? A. \$2800.

Q. And what was the property description there?

A. Lot 4 in Block 104, being portions of Lots 11, 12 and 13.

Q. And you say that you forwarded a cashier's check in that [216] connection?

A. Yes, I see my secretary mailed that. She signed my name there.

Q. Who supplied you with the funds with which to purchase that cashier's check?

A. I have no recollection from where the funds came, whether in check or cashier's check or how it came, but I see there was a cashier's check evidently sent.

Q. Was that your own money that you were

(Testimony of Joseph C. Haughey.)

sending? A. I do not think so, not mine.

Q. Whose was it?

A. It was for the account of Elmer Remmer.
Who supplied it, I don't know.

Q. Are you holding that property for the account of Elmer Remmer? A. I am.

Q. Now, all of the property which has been included in those three exhibits are all contiguous lots, are they not?

A. That's right, as far as I know. That was the purpose, it was my understanding. The acquisitions were made in order to prevent outlet to another street, to increase the parking area.

Q. Yes, we will come to that in a moment. Now, do you continue to hold those for his account up to this date? A. Yes.

Q. And have ever since that date? [217]

A. I have.

Q. Ever since their acquisition?

A. That is right.

Q. Now, in connection with your holding that property, Mr. Haughey, did you also have occasion to execute an agreement with one Brown, whereby the properties described in those three exhibits, that is to say, Lots 4, 5, 6, 7, 8, 9, 10, 11 and 21, were utilized as security for any transaction?

A. I did.

Q. Have you a duplicate original of that agreement with you? A. Yes I have.

Q. That is the document which you have produced?

(Testimony of Joseph C. Haughey.)

A. Yes, in pursuance to the subpoena which directed me.

Mr. Gillen: If counsel for the prosecution desires to put this in evidence, we stipulate it may be put in evidence without objection.

Mr. Campbell: This document marked Plaintiff's Exhibit 50 for identification will be offered in evidence.

The Court: Very well, it may be admitted in evidence, Exhibit 50.

Q. Now, referring to government's Exhibit 50, which I am going to hand you in a moment, Mr. Haughey, at whose instructions did you prepare that document?

A. This was the result of some negotiations between Joseph A. Brown, an attorney representing Gene Schriber, and myself, at [218] the time Mr. Remmer purchased the Menlo Club.

Q. When you say purchased the Menlo Club, do you refer to the acquisition of the lease of the premises?

A. That's right, premises of 1830 and 32 Turk Street, San Francisco.

Q. And in connection with the acquisition of that lease, were the lots referred to used as security for a note which was given in the acquisition of that lease?

A. Yes. Not all the lots that have been referred to here, but certain designated ones in this letter.

Q. I am referring to those set out in Exhibits 45, 46, and 47; that is to say, Lots 4, 5, 6, 7, 8, 9, 10, 11 and 21. A. That's right.

(Testimony of Joseph C. Haughey.)

Q. Is that correct? A. That's right.

Q. What was the total consideration to be paid for the acquisition of the lease of the Menlo Club premises?

A. One hundred seventy-five thousand dollars.

Q. Did you handle the negotiations in that regard?

A. Most of them. Some of the negotiations were handled in my absence between Mr. Remmer and Mr. Brown and others. I was not present at all negotiations.

Q. Now, in regard to those negotiations, who was the principal that you represented?

A. Elmer Remmer. [219]

Q. Referring to that document, it would appear that one Billington was to acquire the lease in his name. A. That is right.

Q. Who is Billington?

A. Joseph Billington is here in the court room. He is also known as Frankie Denny. He was a friend of Mr. Remmer's for many years, ever since they were boys.

Q. And the lease was acquired in the name of Joseph Billington, was it not?

A. That is right.

Q. Rather than in the name of Elmer Remmer?

A. Rather than in the name of Elmer Remmer.

Q. Was that pursuant to instructions given to you by Elmer Remmer? A. That is right.

Q. When was that lease acquired?

A. On or about April 30th of 1945, that is, the

(Testimony of Joseph C. Haughey.)

agreement was reached. The date the transaction was signed, I don't know.

Q. April 1, 1945? A. No, May 1st.

Q. On that occasion was any consideration made to the lessor?

A. As to the actual transfer of money at that time, I have no definite recollection. It was my understanding that down payment was to be 25 thousand dollars and the balance secured by three promissory notes, each in the sum of 50 [220] thousand dollars, accepted by Billington and guaranteed by Remmer.

Q. And was the 25 thousand dollars paid in your presence?

A. As to that I have not a definite recollection at this moment, Mr. Campbell. I am trying to determine just when and where that money was paid or how.

Q. Did you see the three notes that were executed at that time?

A. I have copies of three of them in my office in San Francisco.

Q. You do not have them present?

A. No, I had them in my hands the other day.

Q. Do you recall at this time upon what date those notes matured?

A. I think they were payable—as I recall it—either three months or six months after. They were staggered in that manner, the first one three months after date or six months and the second a like period and the third a like period. I think they

(Testimony of Joseph C. Haughey.)

would be paid for, as I recall, within a year and a half, something like that.

Q. Did you have anything to do with the payment of those notes? A. None whatever.

Q. Let me ask you this, from your knowledge of the transaction, as I understand from your testimony, the 175 thousand dollars was consideration for security of the lease, is that correct?

A. It was consideration for the lease. It was to be a ten-year lease and there were certain physical assets, I think, in [221] there, the material and operation of the business, regular established bar and restaurant, and I forget whether that included the purchase of that. I think it did include the stock in trade and the fixtures of the premises, together with the fact that they were getting a ten-year lease.

Q. Do you recall the names of the establishments located there?

A. I might be wrong; I think there is the 18 Church Street bar, was known as the Turf Club; the place adjoining the restaurant was known as the Menlo Coffee Shop, and the adjoining premises, 32, was combination cigar stand and card room and known as the Menlo Cigar Stand and Menlo Social Club.

Q. Was there a Tiney Waffle Shop?

A. I think that was the name of the restaurant, that is right, Tiney Waffle Shop.

Q. In regard to this lease, was there also to be paid a stipulated monthly rental?

(Testimony of Joseph C. Haughey.)

A. I think there was and I think that is contained in the lease.

Q. Do you recall, from having seen the lease at that time, what those amounts were?

A. No, I wouldn't want to venture.

Mr. Gillen: I submit, your Honor, the lease would be the best evidence of the terms. We have a copy of the original duplicate of the lease.

Mr. Campbell: I suggest, your Honor, we will proceed [222] along our own lines.

Mr. Gillen: Which we are willing to offer.

The Court: Counsel makes a suggestion. Do you care to follow that at this time?

Mr. Campbell: I think it might be marked for identification.

Mr. Gillen: We can offer it in evidence; if you want to use it, we will let you use it.

Mr. Campbell: We haven't seen that.

Q. Now, I am going to show you at this time government's Exhibit 48, which has already been identified here. A. Yes.

Q. That, I believe, refers to Lot 17 and part of Lot 20? A. That's right.

Q. In Block 104 of Richmond Annex Addition, is that correct? A. That's right.

Q. Are you also holding that property subject to the instructions of Elmer Remmer? A. I am.

Q. When was that property acquired?

A. The holding agreement bears date July 19, 1945. The escrow was established, or search was made, title report is dated June 28, 1945.

(Testimony of Joseph C. Haughey.)

Q. What was the consideration paid for that property?

A. On July 25, 1945, I wrote to the Alameda County East Bay [223] Title Insurance Company, re Escrow 342191, Lots 17 and 20, Block 104:

"Gentlemen:

"Enclosed is holding agreement bearing date July 19, 1945, between your company and the undersigned, respecting the above property. It is my understanding that check for the sum of \$4056.65 payable to your order, has been delivered to you, that sum being the balance of purchase price and expenses.

"Very truly yours,

"/s/ JOSEPH C. HAUGHEY,

"Per * * *"

who was my secretary at that time. And now where that money came from, is something I don't know.

Q. Do you know in what form it came to them?

A. I have no knowledge whatsoever. From my letter, "It is my understanding the check has been delivered to you * * *." I don't recall at this time.

Q. For whom do you hold that property?

A. For Elmer Remmer.

Q. Was that property included in the property which was made security for the lease on the Menlo Club property?

A. I don't think so because this bears date July 25, 1945, and the other bears date May 1, 1945.

(Testimony of Joseph C. Haughey.)

Q. Is that the property you referred to which was acquired to give further ingress to the property? A. I believe it is one of the parcels.

Mr. Campbell: At this time, with the Court's permission, [224] I would like to read Government's Exhibit 50 to the jury.

The Court: You may do so.

Mr. Campbell: It is on the letterhead of Joseph C. Haughey, attorney at law, Phelan Building, San Francisco 2, May 1, 1945, (Reads Exhibit). And then are attached three documents, purporting to authorize Joseph Brown to convey the property referred to under the provisions of the holding agreement theretofore executed by Joseph C. Haughey, which I will not read.

Q. Now, is the Joseph Billington referred to in this document the same Joseph Billington that you referred to in your testimony?

A. One and the same.

Q. And to your knowledge did Joseph Billington have any interest whatsoever in these transactions? A. As far as I know, he did not.

Q. Was he anything more than a nominee of Mr. Remmer's?

Mr. Gillen: Objected to as leading and suggestive.

The Court: Objection will be sustained.

Q. Who is Joseph A. Brown to whom this document is addressed?

A. He is an attorney in the Young Building in San Francisco and he was representing Gene

(Testimony of Joseph C. Haughey.)

Schriber in the negotiations for the sale of the Menlo Club to Elmer Remmer.

Q. Who is Gene Schriber?

A. He is in the court room here. He is the owner of the Menlo [225] Club.

Q. Was he also, if you know, the owner of the premises upon which that club was situated?

A. To the best of my knowledge he was at the time these negotiations were entered into.

Q. He was or was not? A. He was.

Q. Did or did not these negotiations include the transfer of the title to the real property?

A. To the best of my knowledge they did not.

Q. The property referred to in government's Exhibits 45, 46, and 47, that is to say, that dozen or so lots in Contra Costa County, in what particular city are they located?

A. El Cerrito, which is in Contra Costa County.

Q. You refer to the fact that there was a 21 Club located there, is that correct?

A. That is my recollection of the name. The address was 90 San Diego Street, but I think the designation at one time either at the time Mr. Remmer acquired the place or after, it was known as the 21 Club.

Q. Do you know whether or not any other establishments were located on that property after Mr. Remmer acquired it?

A. I do not know. I have not seen the property in some time.

(Testimony of Joseph C. Haughey.)

Q. Although you still have full control over the property?

A. It doesn't interest me in seeing it because I have no financial [226] interest in it whatsoever.

Q. When did you cease to be Mr. Remmer's attorney? A. January, 1947.

Mr. Campbell: I think that is all.

Cross-Examination

By Mr. Gillen:

Q. Mr. Haughey, you stated that Mr. Billington, who was named in the lease and agreement with relation to the acquisition of the Menlo Club property, the restaurant, the bar, club, and so on, was also known as Frankie Denny?

A. That is right.

Q. The reason he was also known as Frankie Denny was because in his youth he was a professional boxer, is that right?

A. I never knew his name was Billington. I always knew him as Frankie Denny.

Q. Because he was a boxer?

A. I knew him personally for years as Frankie Denny.

Q. And you did know he and Mr. Remmer had grown up as boys together? A. Yes.

Q. Now, I am going to ask you, Mr. Haughey, it is true, is it not, that prior to the time you were Mr. Remmer's attorney, a senior attorney in your office, Mr. Taffe, was attorney for Mr. Remmer for a number of years? A. That is right.

(Testimony of Joseph C. Haughey.)

Q. And upon the passing of Mr. Taffe you took over Mr. Taffe's [227] work for Mr. Remmer?

A. That is right.

Q. I presume you are familiar with the signature of Elmer Remmer? A. Yes.

Q. And have been familiar with it for many years during the time Mr. Taffe represented him, as well as being his attorney?

A. Yes, Mr. Remmer was a client of Mr. Taffe's father. I have known him since 1929.

Q. Mr. Taffe's father was Joe Taffe?

A. Yes.

Q. I am going to ask you to look at the prosecution's exhibit 50, particularly with reference to the second page of that exhibit, under the wording, "The undersigned do fully consent to the foregoing escrow," and bearing the purported signature of Joseph Billington and Elmer Remmer, and ask you to look at the last signature there and tell us whether or not that is the signature of Elmer Remmer, the defendant in this case?

A. It does not appear the same.

Q. Mr. Haughey, I am going to show you, with the permission of the Court, a document which has been designated Defendant's B for identification, a purported lease, and ask you to look at the last page of this document and tell us whether or not you recognize the signature on that page?

A. Well, it looks like Mr. Remmer's handwriting to me, but I [228] wouldn't vouch for it.

Q. How does it compare with the handwriting—

(Testimony of Joseph C. Haughey.)

Mr. Campbell: We object, if the Court please, this man has not been qualified as an expert. He is being asked to compare certain documents.

Mr. Gillen: I will withdraw the question.

Q. You have not been Mr. Remmer's attorney since 1947? A. January, 1947.

Q. And let me ask you whether, looking at the lease I have handed you and looking at the prosecution's Exhibit No. 50, whether or not that refreshes your recollection that Mr. Remmer's handwriting and your signature is on both of those documents?

Mr. Campbell: Objected to as improper cross-examination.

The Court: Objection overruled.

A. Well, the only way I can answer that question is by saying this, it appears to me defendant's B for identification, the signature affixed to that exhibit on page 8 looks more like Mr. Remmer's handwriting than the signature affixed to plaintiff's Exhibit 50. Whether they are one and the same, I do not know.

Q. Let me ask you if you recollect this, Mr. Haughey—is it not within your recollection that Mr. Schriber and Mr. Brown, his attorney, required that Mr. Remmer personally guarantee the transaction about the lease?

A. Oh yes, they insisted on that. [229]

Q. And they required Mr. Remmer's signature to be attached, not only to the agreement, which is Plaintiff's Exhibit 50 in evidence, but also to the

(Testimony of Joseph C. Haughey.)

lease which has been designated as defendant's Exhibit B for identification?

A. That is right, as a guarantor, you might say.

Q. So that Mr. Remmer's name appeared in that transaction of the Menlo deal, did it not?

A. That's right.

Q. Now, do you recall, Mr. Haughey, that you carried on and conducted the entire transactions for Mr. Remmer and that he was present only at one negotiation, so far as the attorneys are concerned, Mr. Brown and yourself?

A. I wouldn't say, for this reason—I have definite recollection at one time negotiations were entered into and the deal was off. The money, as I recall was all prepared and set to be paid over and a dispute arose, I don't know whether between Remmer and Brown or Remmer and Schriber. The deal was off for two or three days, then negotiations were resumed. What took place in between time, I don't know.

Q. Well, is it within your recollection and memory that you conducted considerable of the negotiations with Mr. Brown and Mr. Schriber?

A. That is right, as portrayed by the paper work in evidence here.

Q. This lease was prepared by Mr. Brown, was it not? I am referring [230] now to defendant's Exhibit B for identification.

A. That is right.

Q. And I take it, as Mr. Remmer's attorney, you were called upon to examine and study that lease and approve it and advise your client to sign it or

(Testimony of Joseph C. Haughey.)

not to sign it, is that correct? A. That's right.

Q. And Mr. Billington signed as lessee and Mr. Remmer signed as guarantor of the lease?

A. That is right.

Mr. Gillen: I would like to offer this lease, may it please the Court, as defendant's next in order.

Mr. Campbell: May I ask a question or two on voir dire, if the Court please?

The Court: Yes, sir.

Q. (By Mr. Campbell): Mr. Haughey, I give you back this defendant's B for identification and ask you if you will examine that document carefully and state whether or not, to your knowledge, that is the original lease or an original duplicate?

A. I would say——

Q. (Interrupting): Have you examined it carefully?

A. It says copy above and it is apparent to me, or at least it is my belief, it is a carbon copy of the original.

Q. Well, have you read the document?

A. Some time ago, yes.

Q. You mean the document which you hold in your hand? [231]

A. What recalls in my mind is the last paragraph, the guarantee. The reason I recall it so vividly is the way Mr. Brown dictated without referring to any form.

Q. I understand that, but I am referring to the body of the indenture, which covers several pages.

(Testimony of Joseph C. Haughey.)

Are you able to say that that is a copy of the original lease? A. Off hand?

Q. Yes.

A. No, I wouldn't be able to say that on recollection, no, I wouldn't say that.

Q. Are you able to say those are the signatures of Gene Schriber and Joseph Billington?

A. Yes, that is Gene Schriber's signature.

Q. Is that the signature of Joseph Billington?

A. I believe that is Billington's. I will vouch for Schriber's. I am almost positive it is the signature of Schriber.

Q. As to the body of the lease, are you able to say that is either the original lease or an exact copy thereof?

A. I can only answer that by saying it is my belief it is a copy of the original.

Q. Can you state definitely that it is?

A. As a matter of recollection of it, no, I could not say that.

Mr. Campbell. Then we object.

Mr. Gillen: Of course it is fundamental any one who makes a lease makes more than one copy. The lessee gets one [232] and the lessor.

The Court: Objection overruled. The exhibit is admitted in evidence.

Q. (By Mr. Gillen): Mr. Haughey, you said your most vivid recollection of any wording in that document was the guarantee that was required to be signed by Mr. Remmer in that lease?

(Testimony of Joseph C. Haughey.)

A. That is right. The dictation of Mr. Brown, without any recourse to a form book.

Q. You admired him? A. Right.

Q. Now, Mr. Haughey, it is true, is it not—and with the Court's permission, I will show you what is now defendant's B in evidence, the lease—it is true, is it not, the beginning of the guarantee by Elmer Remmer starts on page 7, which is the same page which bears the signature of Gene Schriber as lessor and Joseph Billington as lessee?

A. That is right.

Q. And then it carries over to the final page of the document, which bears Mr. Remmer's signature, is that correct? A.. That is right.

Mr. Campbell: With the permission of the Court, I should like to read that portion to the jury, starting on page 7 of defendant's Exhibit B:

"I, Elmer Remmer, for and in consideration of the execution of said lease to Joseph Billington, do absolutely and unconditionally, for [233] value, guarantee the full provisions of said lease and payment of the rent therein provided for. I agree in case is instituted to enforce any terms of the said lease or collect any rent, I will pay a reasonable attorney's fee. I waive all notice of default or non-provision and agree that the lessor may * * *"

bearing the signature, Elmer Remmer. I think that is all.

(Testimony of Joseph C. Haughey.)

Redirect Examination

By Mr. Campbell:

Q. Mr. Haughey, I am going to show you again defendant's Exhibit B and ask you to state whether or not that document bears any notarial acknowledgement? A. It does not.

Mr. Gillen: That would be incompetent, irrelevant and immaterial.

The Court: He already answered the question, it does not.

Q. Does that document show any evidence of ever having been recorded?

Mr. Gillen: Just a moment——

A. Under California law it isn't necessary.

The Court: Just a moment—do you have an objection?

Mr. Gillen: I will let the answer stand.

Q. Have you answered my question?

A. I said under California law——

Q. (Interceding): That is not my [234] question.

A. No, none whatsoever. It couldn't be recorded unless it was acknowledged.

Q. Does it show any evidence of having been recorded?

A. It does not, never was, to the best of my knowledge. Maybe the original was, but this one wasn't.

Q. Does that document show any place for a notarial acknowledgment to be executed?

(Testimony of Joseph C. Haughey.)

A. The same space here——

Q. I mean does it show the language.

A. No, it hasn't got it typed in, but slip can be attached to it, as often is done by the notary.

Mr. Campbell: That is all.

Mr. Gillen: I think that is all.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 2:50 p.m.)

3:05 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

GENE SCHRIBER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Gene Schriber.

Q. Where do you live? [235]

A. 3015 19th Avenue, San Francisco.

Q. What is your occupation?

A. Property owner.

Q. That is your only occupation? A. It is.

Q. Are you acquainted with the defendant here, Elmer Remmer? A. I am.

(Testimony of Gene Schriber.)

Q. Over what period of time have you known him? A. I would say since about 1940.

Q. Did you have occasion, during the year 1945, and particularly on or about May 1, 1945, to enter into some business agreement with him?

A. I did.

Q. You have been subpoenaed to produce here a certain lease agreement, together with supplemental agreements. Have you done so?

A. Yes, I have.

Q. Will you produce them?

A. This is the original lease and bill of sale.

Q. And the third document is the receipt, is it not? A. That's right.

Mr. Campbell: I will ask to have these marked for identification at this time, in the following order—a lease as produced as 51 for identification, the bill of sale as 52 for identification, and the receipt as 53 for identification. [236]

Mr. Gillen: The defense, may it please the Court, has no objection to these three documents, 51, 52, and 53, now being for identification, going into evidence if the prosecution desires to offer them.

Mr. Campbell: They will be offered as 51, 52, and 53.

The Court: They will be admitted.

Q. Handing you these three documents, which you have identified as 51, I believe, is the original lease, is that correct? A. Correct.

Q. No. 52 is a bill of sale. I note, Mr. Schriber,

(Testimony of Gene Schriber.)

that that document is not executed. Do you have the original of that document?

A. That is the only one I have, unless Mr. Brown has it.

Q. Your attorney has that?

A. He may have it. I haven't got it.

Mr. Gillen: Is that the receipt?

Mr. Campbell: Bill of sale.

Q. Do you have an executed copy, Mr. Schriber, of that bill of sale?

A. No, this is all I have.

Q. I observe that the bill of sale refers to the sale of certain fixtures, does it not?

A. Yes, it does.

Q. At the property known as Tiny's Bar and Tiny's Restaurant, is that correct? [237]

A. And the Menlo Club.

Q. That is in connection with the lease which you have produced here?

A. Yes, that is in connection with the lease.

Q. I also observe that both the lease which you hold and that bill of sale are in the name of Joseph Billington? A. That is correct.

Q. Do you know Joseph Billington?

A. Yes, I know Joseph Billington now. At that time it was only a name to me.

Q. At the time the documents which you hold, government's exhibits 51 and 52, that is to say, the lease of the Menlo Club, Tiny's Bar and Tiny's Restaurant, were executed, April 30, 1945, and May 1, 1945, Joseph Billington was unknown to you?

(Testimony of Gene Schriber.)

A. It was just a name. I knew him under another name, Frankie Denny.

Q. Did you know him personally? A. Yes.

Q. How long had you known him?

A. Maybe two or three years.

Q. With respect to the lease, with whom did you negotiate? A. Mr. Remmer.

Q. By Mr. Remmer, you refer to Elmer Remmer, the defendant here? A. That is correct.

Q. Did you have any negotiations with Joseph Billington, or [238] Denny, as you then knew him?

A. None whatsoever.

Q. When did you first learn that his name was to be placed on these documents?

A. Well, that is a little hard for me to say, but I think it was right around close to the 30th of April.

Q. Now, referring to the lease which covers the premises at 1830 and 32 Turk Street, in the City of San Francisco, are you the owner of those premises? A. Yes.

Q. When did you acquire those premises?

A. 24th day of April, 1945; I am sure that is the date.

Q. To what document are you referring?

A. You asked me when I acquired the property?

Q. Yes.

A. I happen to have it on a calendar here. It was Wednesday, the 25th.

Q. And these documents were executed on April 30th, is that correct?

(Testimony of Gene Schriber.)

A. That is correct, the bill of sale. The lease was drawn later.

Q. Referring to government's Exhibit 51, the lease, I observe that that is dated May 1st—

A. As per our agreement, yes.

Q. (Continuing): —and apparently it would appear to be executed [239] on May 1st. Was that document in fact made and executed on that date?

A. Well now I don't know if it was that exact date or a day or two later, but it was very close to May 1st.

Q. Now, that document calls, does it not, for the payment of 175 thousand dollars?

Mr. Avakian: May we ask which document counsel refers to?

Mr. Campbell: I am referring to the document in the witness' hand, government's Exhibit 51.

Q. For the payment of 175 thousand dollars for a ten-year lease on the described premises, is that correct? A. That is incorrect.

Mr. Avakian: Your Honor, if we may object—I believe counsel is mistaken. Exhibit 51, the lease, I do not believe contains that language.

Mr. Campbell: I will use the exact language of the document. May I have it again?

Q. Referring to government's Exhibit 51—yes, I will stand corrected—the lease itself calls, does it not, for a total payment of 219 thousand dollars rental for the premises described?

A. That's right.

Q. In addition to that, I take it from the bill of

(Testimony of Gene Schriber.)

sale or from the receipt, government's Exhibit 53, an additional 175 thousand dollars was paid as consideration for that lease, is [240] that correct?

A. No, that is not correct.

Mr. Avakian: Just a moment—

Q. What was the transaction?

The Court: Do you have an objection?

Mr. Gillen: Objected to as leading and suggestive and assuming something not in evidence. There is no evidence that the sum of 175 thousand was paid.

The Court: Did you hear the witness' answer?

Mr. Gillen: No, I didn't hear it.

The Court: He answered no. Do you want the answer stricken?

Mr. Gillen: No, your Honor, we will let it stand.

Q. At the time of the execution of these documents, did you receive any sum of money, Mr. Schriber? A. Twenty-five thousand dollars.

Q. By whom was that paid to you?

A. That I can not tell you because it was left with my attorney, Joseph A. Brown, and I don't know who delivered the money. They came over and I had the documents signed and they picked them up and left twenty-five thousand dollars in cash. I didn't get it until the following day.

Q. Had you, yourself, previously operated these premises? A. For a period of time, yes.

Q. In your own behalf or for others? [241]

A. In my own behalf.

Q. And what was the nature of the operation

(Testimony of Gene Schriber.)

on the premises acquired under the terms of this lease? A. I don't understand the question.

Q. What was the nature of the operation?

A. It was a card room and bar and restaurant.

Q. By card room, what do you mean?

A. Well, they play games with cards, like panguingue and low ball and form of poker, any legal game that was allowed in the State of California, that is what they had there.

Q. To your own knowledge did those operations continue after the lease was executed?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled. You may answer the question. A. Yes, they did.

Q. And over what period of time did you observe that operation with the card room continued after the execution of the lease?

A. Well, that is something I just don't remember the exact time but approximately I would say close to two weeks.

Mr. Campbell: At this time, if the Court please, I should like to read to the jury Plaintiff's Exhibit 53.

(Reads Exhibit 53.)

Q. Was the original signed and delivered to some one? [242]

A. It must have been, yes.

Q. To whom was it delivered?

A. Joseph A. Brown had it in his office and it

(Testimony of Gene Schriber.)

was picked up there at the time I received the twenty-five thousand dollars.

Q. By Joseph A. Brown, do you refer to your attorney? A. Yes.

Mr. Campbell: If the Court please, I wish at this time to read certain portions of Plaintiff's Exhibit 51, the lease.

The Court: You may do so.

Mr. Campbell (Reads): "This indenture made and entered into this first day of May, 1945, by and between Gene Schriber of the City and County of San Francisco, State of California, and Joseph Billington, of the same place, hereinafter called, respectively, the lessor and lessee: Witnesseth: That the lessor, in consideration of the rents, covenants and agreements hereinafter contained, to be paid, kept and performed by the lessee, and upon the condition that each and all of the said covenants and agreements shall be fully kept and performed by the lessee, does by these presents, lease, demise and allow unto the lessee, for the purpose of conducting thereon a restaurant and cocktail bar, those certain premises situated in the City and County of San Francisco * * *"

And then describing the ground and upper floor of the building [243] known as 1832 Turk Street and the premises known as 1832 Turk Street:

"* * * for the term of ten years at a total rent or sum of 219 thousand dollars, payable as follows: For the first five years at the rate

(Testimony of Gene Schriber.)

of \$1650 per month, payable monthly in advance, the next five years at the rate of \$2000 per month."

I will not read the body of the lease except for certain provisions—I will not read any of the body of the lease. The signatures of Gene Schriber and Joseph Billington, then follows the language as read to you by Mr. Gillen.

Q. In connection with that document, Mr. Schriber, as respect to the bill of sale and receipt, with whom were your negotiations?

A. Mr. Remmer.

Q. And over what period of time did they take place?

A. Well, it was a little over a day when we come to an agreement.

Q. And you say that you received the initial payment on the 175 thousand dollars of 25 thousand dollars, is that correct?

A. That is correct.

Q. And how much of the entire 175 thousand dollars have you received?

A. One hundred fifty thousand of it.

Q. In addition to that, have you also received the monthly rentals as stipulated? [244]

A. I have.

Q. During the period 1945 and 1946, inasmuch as the lease calls for a payment of \$1650 a month from and after May 1, 1945, did you receive the sum of \$1650 a month from Mr. Remmer?

A. Yes.

(Testimony of Gene Schriber.)

Q. Is that any part of the 150 thousand which you received?

Mr. Gillen: Of course, that is assuming that that was received in 1946. Objected to on the ground it is assuming something not in evidence.

The Court: Objection will be overruled. Answer the question.

Q. May I have the answer?

(Question read.)

A. You mean is that \$1650 part of the 150 thousand dollars?

Q. Yes. A. No.

Q. Were any of the sums which you received paid to you by Joseph Billington?

Mr. Gillen: I think that would be calling for opinion and conclusion of the witness. Does he mean personally?

Q. Personally by Mr. Billington? A. No.

Q. Now, you said that at the time of these negotiations, or at the time these documents were signed by you, you received 25 thousand dollars in cash at your attorney's office, is that correct? [245]

A. That's correct.

Q. Did you subsequently have a conversation with Mr. Remmer regarding that 25 thousand dollars? A. I did, yes.

Q. When was that?

A. Well, I don't remember the exact date of it. It wasn't important at that time, though I can relate the conversation.

(Testimony of Gene Schriber.)

Q. Approximately how long was it after you received the 25 thousand dollars?

A. Well, I would say about six weeks.

Q. And where did the conversation take place?

A. That I don't remember.

Q. Do you recall if any one else was present?

A. No.

The Court: I don't understand your answer. Was there any one else present?

A. He asked me if I recall any one and I said no.

Q. You don't recall, or was there any one present?

A. I don't know if there was or not.

Q. Now, will you relate that conversation?

A. Yes. Mr. Remmer asked me if I would mind to let him issue me a check for that 25 thousand dollars. He had hired Mr. Maundrell to set up a set of books and wanted that check for his business so he would have a check for his transactions. [246]

Q. What did you do?

A. He issued me a check and I returned the 25 thousand dollars to him and accepted the check.

Q. Do you recall by whom the check was signed?

A. Yes, sir, Maundrell.

Q. Signed by Maundrell?

A. That is right.

Q. Have you ever seen that check since that time?

A. Never have.

Q. Was the check delivered to you?

A. I don't recall if I cashed the check or cashed

(Testimony of Gene Schriber.)

it at 52 Mason Street. I don't recall, but I just vaguely remember that I cashed it with some one else.

Q. And have you ever seen the check since that time? A. I have not.

Q. Was there any other signature on the check other than that of Maundrell?

A. Not to my memory.

Q. Do you recall Maundrell's first name?

A. Harold Maundrell.

Q. Do you recall that there was any imprinted or printed signature appearing above the signature of Harold Maundrell?

A. I don't remember whether there was or not.

Q. Do you recall upon what bank that check was drawn? A. No, I don't. [247]

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Schriber, from your testimony I take it that you had acquired the property which houses on the ground floor of the Menlo Club the Menlo Cigar Stand and Menlo Social Club, the Turf Club, which was a bar or tavern, a restaurant, Tiny's Waffle Shop, and which also housed some quarters on the second floor, just a short time before you entered into the lease arrangement, sale of the premises, is that right? A. That is right.

Q. As I recall your testimony, it was on the 25th of April, 1945, that you actually became the owner

(Testimony of Gene Schriber.)

of the building and on the 30th of April and May 1st these documents were executed in your transactions with Mr. Remmer, with Mr. Billington being the designated person to hold the lease?

A. That is correct.

Q. Now prior to that time the combined rent for that building had been \$825 a month, had it not, or half of the \$1,650 a month?

A. That is right.

Mr. Campbell: Objected to as immaterial.

Q. And the 219 thousand dollar figure set forth in the lease which Mr. Campbell read to you, that comprised the total amount of the lease, month to month, over a period of ten years, with the rent being fixed at \$1,650 per month for the first five years and two thousand dollars per month for the last five years, is that [248] correct?

A. That is correct.

Q. Now I will show you here the prosecution's Exhibit 51 in evidence and defendant's Exhibit B in evidence. One indicates as an original and the other a copy of the lease, the property we are now referring to. With the Court's permission, I would like to present them to the witness. Will you look at those and tell us whether you recall those being prepared by your lawyer, Mr. Joseph A. Brown, in San Francisco?

A. That is correct. Mr. Brown prepared both of these.

Q. Will you look at the signatures on page 7 and tell us whether or not you recognize your signature

(Testimony of Gene Schriber.)

on both of those documents, both plaintiff's Exhibit and defendant's exhibit?

A. Both my signatures.

Q. You signed them both. Now you notice that on page 7, immediately after your signature and Mr. Billington's signature, there is commenced the wording of a guarantee under the obligations of that lease, do you notice that? A. Yes.

Q. And on the following page there is a signature contained. Do you know whose signature that is? A. I assume it is Elmer Remmer's.

Q. Do you recall whether it was at your request or demand, or at your lawyer's request or demand, or whether it was voluntarily that Mr. Remmer guaranteed the obligations of that lease to [249] you?

Mr. Campbell: Objected to as a compound question.

The Court: Objection will be overruled.

Q. Do you understand the question, Mr. Schriber? A. I would like to have you read it.

(Question read.)

A. Well, I think it was at my request, because Joseph Billington was only a name to me and that was quite a large sum of money there involved and I wanted Mr. Remmer's guarantee it would be paid.

Q. That was the reason for the signing of the guarantee by Mr. Remmer?

A. That is right.

(Testimony of Gene Schriber.)

Q. Now there was some security put up, was there not, in the form of some lots in El Cerrito? Do you recall that? A. That is right.

Q. I am going to show you plaintiff's Exhibit 50, which is the letter from Mr. Haughey to Mr. Brown, your attorney, regarding the placing the lots as security. I will ask you to look at the second page of that exhibit and note whether or not Mr. Remmer also signed a consent to those lots being used for that purpose?

Mr. Campbell: I suggest the document speaks for itself.

The Court: Objection overruled.

Mr. Gillen: It is preliminary.

A. I don't think I could answer this question because I am not familiar enough with Mr. Remmer's analyzing to state. [250]

Q. Do you recall there was a request made to Mr. Remmer to join in consenting?

A. And I remember that this is his signature, yes.

Q. By the way, Mr. Campbell asked you a moment or two ago if any part of the additional 150 thousand dollars that you were to receive under the agreement of sale, over and above the 25 thousand dollars cash that you received, was any part of the money under the lease and you answered no. It is something separate?

A. That was altogether separate.

Q. Now that 25 thousand dollars which you received and which you later gave back and accepted

(Testimony of Gene Schriber.)

a check for, at the request of Mr. Remmer, so there would be a check transaction and a record of the transaction, any additional payments were made over a period of time, were they? A. Yes.

Q. Do you recall how much additional over and above the initial 25 thousand dollars was paid in the year 1946?

A. There was another 25 thousand dollars paid, making a total of 50 thousand dollars in 1945.

Q. Mr. Avakian has called my attention—I mean in the year 1945, I should have asked you. You received 25 thousand dollars in the year 1945 initially when the transaction took place?

A. That is correct.

Q. Did you receive any other payments in the year 1945? [251] A. Yes, I did.

Q. Can you tell us what payments you received?

A. On September 8th I received 25 thousand dollars more.

Q. So you received in the year 1945 the sum of 50 thousand dollars? A. That is correct.

Q. Did you receive any payment in the year 1946?

A. Yes, two payments in 1946; one February 28th for 25 thousand dollars and another one on May 1st for 25 thousand dollars.

Q. So that in the years 1945 and 1946 you received a total of 100 thousand dollars?

A. That is correct.

Q. And that left a balance under that agreed

(Testimony of Gene Schriber.)

figure of 75 thousand dollars to be paid, is that correct? A. Correct.

Q. Now you say that Mr. Remmer, when he made a request of you that the 25 thousand in cash initially paid to you on the 175 thousand dollar agreement, be returned to him and replaced by a check? A. Correct.

Q. And you said in your direct examination that he stated to you he had engaged the services of Mr. Harold Maundrell to set up books for use in the business, is that correct? A. Correct.

Q. And that he desired to have a check record of the transaction? [252] A. That is correct.

Q. Then I understood you to testify that to accommodate him you returned the 25 thousand dollars in cash and accepted in lieu thereof a check, which was signed by Harold Maundrell, is that correct? A. Correct.

Q. And it is your recollection that you cashed that check through some one other than through Mr. Maundrell or Mr. Remmer? A. Yes.

Q. You do not recall the bank that the check was on? A. No, I do not.

Q. Mr. Schriber, the second payment of 25 thousand dollars which you received under that 175 thousand dollar agreement that we mentioned here, which you say you believe you received in September of 1945—

A. That is correct, September 8th.

Q. —was that in the form of a check, that payment?

(Testimony of Gene Schriber.)

A. That was in the form of three checks, split up, one for 15 thousand, one for 8,500 and one for 1,500.

Q. Do you recall whose checks they were? I mean do you recall who the payer was who signed that?

A. I think Mr. Maundrell did. I am sure he did.

Q. As I recall your testimony, you said the next payment you received was the sum of 25 thousand dollars paid in February of [253] the following year, 1946, is that correct? A. Correct.

Q. Was that payment made in the form of a check? A. Yes.

Q. And do you recall who signed that check?

A. Maundrell.

Q. Do you recall the final payment of the year 1946, I do not think you gave us the month.

A. May 1, 1946.

Q. Do you recall what form the payment was received by you of the 25 thousand dollars on that date? A. A check.

Q. By whom was that check signed?

A. Maundrell.

Q. By Mr. Maundrell. Now in addition to those four payments that you have mentioned here on the agreement, Mr. Schriber, there was also, I understood you to say, paid to you \$1,650 per month on rent, is that correct? A. Yes.

Q. And in what form of payment did you receive the monthly rental? A. By check.

Q. And who signed those checks?

(Testimony of Gene Schriber.)

A. Maundrell.

Q. So that the beginning of each and every month, if that was [254] the starting point of the rental, you received a check for \$1,650 signed by Mr. Maundrell? A. That's right.

Mr. Gillen: I think, may it please the court, that this is all the cross-examination we have of Mr. Schriber. We would like, however, for Mr. Schriber to be on call for possible further cross-examination.

The Court: Do you suppose you would want him tomorrow or some time later in the trial?

Mr. Gillen: Possibly a little later in the trial, your Honor.

The Court: Well, he could be excused now and return to San Francisco.

Mr. Campbell: I have one question on redirect, if the Court please.

Redirect Examination

By Mr. Campbell:

Q. You stated, Mr. Schriber, that you received fifty thousand dollars on this deal in 1945?

A. That is correct.

Q. Have you any books or records to which you can refer, which you can produce, with regard to the payments which you received? A. No.

Q. Isn't it a fact that you received 75 thousand dollars in 1945?

A. It is not. I was to receive 75 thousand but I didn't and [255] the reason was because I also

(Testimony of Gene Schriber.)

agreed to deliver a liquor license to Mr. Remmer and I was unable to do so and the bar got closed up from early September until late in December and I have correspondence right here with me between my attorney at that time, Herbert Erskine, and Elmer Delaney, about the liquor license being transferred to me from Mrs. Bailey, which she refused to do at the Board of Equalization in the City of San Francisco closed that bar up.

Q. At any rate, you are positive that 50 thousand dollars was all that you received?

A. Yes, I am, and that is the reason I didn't get it.

Recross-Examination

By Mr. Gillen:

Q. Mr. Schriber, the incident you are referring to now is this, that you were to receive the third payment of 25 thousand dollars in the year 1945?

A. According to my agreement, yes.

Q. And according to the agreement you were also supposed to transfer over to Mr. Remmer the California State liquor license?

A. That is right.

Q. To enable the tavern to conduct business?

A. That is correct.

Q. And without that, under California law, the tavern couldn't conduct business?

Mr. Campbell: Objected to as calling for legal conclusion. [256]

The Court: I think the objection is good.

(Testimony of Gene Schriber.)

Mr. Gillen: I will withdraw that.

Q. At that time your attorney handling some of your affairs was Mr. Herbert Erskine, who is now recalled as the late United States District judge, as the party involved? A. That is right.

Mr. Campbell: Objected to as immaterial.

The Court: It may stand.

Q. At that time the party that you acquired the property from was represented by Mr. Elmer Delaney as attorney? A. Correct.

Q. You were unable to obtain transfer of the liquor license in order to transfer it over to Mr. Remmer? A. That is correct.

Q. And as a result of that, Mr. Remmer did not have the benefit of the tavern being open from September until some time after the first of the year of 1946, is that correct?

A. Closed until the first of the year. I think late in December of the same year they got open.

Q. And for that reason you did not press the third payment and he did not agree to pay the third payment until the liquor license was forthcoming?

A. He refused to pay it for that reason.

The Court: Mr. Schriber may be excused, subject to his recall? He may return to San [257] Francisco.

Mr. Gillen: Yes, your Honor.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.)

Wednesday, December 5, 1951, 10:15 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

JOSEPH BILLINGTON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Joseph Billington.

Q. Where do you reside?

A. 456 B Street, Oakland.

Q. What is your business or occupation?

A. I am interested in a tavern in Oakland.

Q. What is the name of the tavern?

A. East Shore Inn.

Q. Are you acquainted with the defendant, Elmer Remmer?

A. Yes, sir.

Q. How long have you known him?

A. Approximately all my life.

Q. Mr. Billington, you were here in court yesterday?

A. Yes, sir.

Q. You are the same Joseph Billington referred to in the testimony?

A. That's right.

Q. I am going to show you plaintiff's Exhibit 51, which purports [259] to be a lease or indenture entered into between yourself and one Gene Schriber, and ask you if that is your signature appearing thereon?

A. Yes, it is my signature.

(Testimony of Joseph Billington.)

Q. Have you ever read that document?

A. No, sir, I haven't.

Q. That is your signature appearing thereon?

A. It is, yes.

Q. Was your signature placed there at the request of any one?

A. Well, I was asked to sign the lease.

Q. Who asked you to sign the lease?

A. Mr. Remmer.

Q. Did you, yourself, have any interest in that lease? A. No, sir.

Q. You will observe that the lease refers to premises occupied by certain enterprises known as Tiny's Bar, Tiny's Restaurant, and the Menlo Club.

Mr. Gillen: That would be the Turf Bar.

Q. The Turf Bar, pardon me. A. Yes, sir.

Q. Did you at any time have any interest in those enterprises? A. No, sir.

Q. Did you at any time have anything to do with the operation of those enterprises?

A. No, sir. [260]

Q. Did you at any time have anything to do with the operation of any enterprises at 18 Turk Street, 30 Turk Street, or 32 Turk Street in the City of San Francisco? A. No, sir.

Q. Did you at any time receive any profits as a result of any operations conducted on those premises? A. No, I didn't.

Q. I show you at this time government's Exhibit

(Testimony of Joseph Billington.)

52, which purports to be a bill of sale to you of certain liquor licenses and other matters, and ask you if you have ever seen that document or the original thereof? A. No, sir, I have never seen this.

Q. Or did you ever see the original of that?

A. No.

Q. Did you at any time have any interest in any of the matters set forth in that bill of sale?

Mr. Gillen: May it please the court, in the interest of time, we are perfectly willing to stipulate that Mr. Billington's name appears on the documents that have been introduced by stipulation by the defense and that he was requested to place his name on those documents by the defendant and that he had no interest and drew no income from any of those enterprises, if that will save time.

Mr. Campbell: I think we should have the testimony.

Mr. Gillen: It was only in the interest of [261] time.

The Court: You may proceed.

Q. Did you at any time have any interest in those liquor licenses? A. No.

Q. I show you government's Exhibit 53, which purports to be a receipt, identified by the witness Gene Schriber, wherein it is related that you had paid to him the sum of 25 thousand dollars on account of the purchase price of Tiny's Bar, Tiny's Restaurant and the Menlo Club and agreed to pay an additional sum of 150 thousand dollars, and I

(Testimony of Joseph Billington.)

will ask you if you ever saw that receipt or the original thereof?

A. I do not recall ever seeing any such receipt like that.

Q. Did you ever at any time pay to Gene Schriber, or to any one on his account, the sum of 25 thousand dollars?

A. No, sir.

Q. Or did you at any time pay Mr. Schriber any other sum whatever?

A. No, sir.

Q. Or have you ever had any business dealings with Mr. Schriber with relation to those premises on Turk Street?

A. No, sir.

Q. Now, were you ever employed by Mr. Remmer?

A. Well, I was employed by Mr. Remmer and Mr. Kyne at 110 Eddy Street at one time.

Q. By Mr. Remmer and who? [262]

A. Mr. Willie Kyne.

Q. Were you also employed at the 21 Club?

A. Yes, sir, I was.

Q. In El Cerrito?

A. Yes, sir.

Q. And over what period of time were you employed there?

A. Well, I am not too sure. It seems to me it was 1943 to September, 1945. I am not positive. I have forgotten the dates myself. I don't remember.

Q. And what was the nature of your employment at the 21 Club?

A. Well, I was in charge of the bar. I was on the floor also.

Q. Did you also work in the restaurant there?

(Testimony of Joseph Billington.)

A. Well, yes, I did, yes. It was all one room there, the bar and the restaurant.

Q. And was that the 21 Club located at 90 San Diego Street in El Cerrito?

A. That would be the address, I believe, 90 San Diego Street.

Q. What was the nature of the enterprise? What was conducted on those premises?

Mr. Gillen: Objected to as already asked and answered. He says a bar and restaurant.

The Court: Objection overruled.

A. Well, restaurant and bar and casino.

Q. What do you mean by casino?

A. Well, they had games in back. [263]

Q. What type of games?

A. Roulette, twenty-one, craps.

Q. Was there also a game known as barbuti played there?

A. Not to my knowledge.

Q. Did you have anything to do with the operation of the gaming room?

A. No, sir, I did not.

Q. Who had charge of that?

A. Well, I don't remember just who did have charge of that. I was so seldom in there. Mr. Pechart and Mr. Kessel were around there and who worked back there, I just knew by names; I didn't know their titles or what they did.

Q. What were your principal duties?

A. Well, my principal duties were to watch the front end of the bar and the restaurant and meet people.

(Testimony of Joseph Billington.)

Q. What compensation did you receive for your services?

A. Well, I received, I believe it was \$75 a week and later it was \$100 a week for my services.

Q. Did you at any time have any proprietary interest in those premises or in that operation?

A. No, no, I didn't.

Q. Who employed you to work there?

A. Mr. Remmer.

Q. And were you subject to his orders at all times?

A. Well, I guess so. Mr. Remmer wasn't around there too much. [264] Didn't see too much of Mr. Remmer.

Q. Did you look to him for orders, instructions?

A. Well, as I say, I never seen too much of Mr. Remmer, so there wasn't any instructions coming.

Q. Very well. You did, however, did you not, file a partnership return for that enterprise for the year 1944?

A. Well, I can't answer the question. I don't know.

Q. I wish to show what purports to be a partnership return of income for the year 1944 and ask you if that is your signature affixed thereto?

Mr. Gillen: Just a moment. Is this something that has been placed before the court for identification?

Mr. Campbell: I beg your pardon. I would like to have that marked for identification.

Mr. Gillen: If it is, I would like to see it.

(Testimony of Joseph Billington.)

The Court: Marked Exhibit 54 for identification.

Mr. Campbell: While counsel is examining that, I will ask to have this marked 55 for identification.

Mr. Gillen: The defense is willing to stipulate that those two returns are the returns of Mr. Billington for the years 1944 and 1945.

Mr. Campbell: I wish to interrogate the witness, Mr. Gillen.

The Court: You may proceed.

Q. I show you government's Exhibit 54 for identification and [265] that you examine that and state whether or not that is your signature affixed thereto?

Mr. Gillen: I don't know whether we made ourselves plain. We are willing to stipulate that those two documents may be admitted.

The Court: You mean admitted in evidence?

Mr. Gillen: Yes.

The Court: Exhibit 54 by stipulation is admitted in evidence.

Mr. Campbell: I presume the same stipulation will be made as to 55?

Mr. Gillen: Yes.

The Court: Exhibit 55 will be admitted in evidence.

Mr. Campbell: With the Court's permission, I would like to read the exhibits.

The Court: You may do so.

Mr. Campbell (Reads Exhibit 54): There is-

(Testimony of Joseph Billington.)

attached a document entitled "Agreement." (Reads agreement.)

Q. Mr. Billington, did you receive any of the share of profits of that enterprise?

A. One year I got two thousand dollars.

Q. Was that as a share of the profits or as a bonus?

A. I believe that was working on the job, five per cent or something was paid for working there.

Q. That was in connection with your job? [266]

A. I guess so.

Mr. Campbell: Reading government's Exhibit 55: (Reads) From Schedule I: "Partner's Share of Income and Credits. J. Billington, 456 Lee Street, Oakland, California, \$3,638.17."

Q. Did you receive any such amount?

A. Not to my knowledge. I don't remember.

Q. You don't remember receiving any such amount?

A. No.

Mr. Campbell: (Reads balance of Exhibit.)

Q. Now, Mr. Billington, it has been stipulated here that these documents were signed by you. So there will be no question, you might examine your signature there.

A. Yes, that is my signature.

Q. Now, at the time you signed those returns did you read them over?

A. No, sir, I did not.

Q. Until this day did you know what was contained in those returns?

A. No, sir.

Q. Do you know whether or not the figures

(Testimony of Joseph Billington.)

which I read to you include the gaming room as well as the operation of the bar and restaurant?

A. I couldn't answer the question truthfully because I really don't know. [267]

Q. What was the nature of the restaurant operation there? Was it simply a cafe, night club, or what?

A. Well, it was the same as night club, had a dining room.

Q. Was there entertainment there?

A. They did have some entertainment at different times, yes.

Q. How many people could be seated in that restaurant?

A. Oh, probably 85, I believe, I am not sure.

Q. How large was the bar that was operated there?

A. Well, the bar went across the back of the room, possibly 20-foot bar; I couldn't tell you truthfully because I don't know. About 20 feet, I suppose.

Q. I believe you stated that you had received two thousand dollars at one time, is that correct?

A. That is correct.

Q. Do you recall in what year you received that?

A. No, I don't know, I don't know what year.

Q. How large was the gaming room on those premises?

Q. Well, they weren't too large. I don't know

(Testimony of Joseph Billington.)

how long this room is—well, say 35 feet, just guessing.

Q. Would it be as large as this room?

A. No, it isn't as large. Might have been practically as long but not as large.

Q. How much equipment was in there?

A. Well, that I don't know. I didn't know what was back there, as far as equipment was [268] concerned.

Q. You don't know how many tables were there?

A. No, I couldn't answer that.

Q. Do you have any knowledge yourself of what the income was from any part of that operation during the years 1944, 1945, and 1946?

A. Mr. Campbell, I wouldn't know what it was.

Q. Who kept the books and records?

A. I believe Mr. Simmons, as you stated.

Q. That is Mr. G. E. Simmons?

A. I believe so, George Simmons.

Q. Did you have anything to do with the handling of the receipts at the end of the day?

A. Well, on the bar I did sometimes, yes.

Q. Did you have anything to do with the receipts from the gambling room? A. No, sir.

Q. Did you have anything to do with the receipts from the restaurant?

A. No, I don't think I ever had anything to do with them. I was used to the bar and the bar was my line.

Q. Did you have anything to do with the payment of the expenses of any part of the operation?

(Testimony of Joseph Billington.)

A. No. Only expenses, probably a liquor bill, or something like that.

Q. In other words, daily bills, I take it? [269]

A. Well, yes, like liquor bill or bills like that.

Q. Where a delivery man would present a bill, is that correct?

A. Well, no. You see, we had to have two signatures on those checks and I forget the other man to sign the check—well, Mr. Simmons had authority and I but Mr. Simmons generally did all the stuff unless he had to put my signature on, then he would send it out.

Q. Was your name on some bank account in connection with that operation?

A. Well, I don't know. I think they had a bank account in the Mechanics Bank, but I don't know whether in my name truthfully or whose name it was.

Q. Did you have anything to do with handling that bank account? A. No, sir.

Q. You say your signature was required on the checks?

A. Well, sometimes, you go to the bank, like you have an account and have them recognize my signature for a check.

Q. Well, on expenses that were paid out by the 21 Club, did you have to sign that check?

A. No; no, sir.

Q. What checks did you have to sign?

A. Well, now, I am kind of confused. I think I signed pay checks.

(Testimony of Joseph Billington.)

Q. Do you recall that you signed anything else?

A. I don't recall.

Q. Were those pay checks for the entire enterprise, that is, [270] for the bar, the restaurant and the gambling?

A. I think it was for the bar and the restaurant. I don't recall ever having anything to do, as I say, with the back room, to my knowledge.

Q. Do you know whether or not there was more than one bank account maintained?

A. That I don't know.

Q. Who would present you checks for signature?

A. Oh, Mr. Simmons.

Q. Would those checks be filled out at the time they were handed to you, or were they given to you in blank?

A. I can't answer the question truthfully.

Q. You don't remember?

A. It seems to me they must have been filled in. I really don't remember.

Q. Do you recall upon what bank or banks those checks were drawn?

A. Well, there is a bank there in El Cerrito. It could have been the Mechanics, I am not sure.

Q. You are not sure what bank?

A. There is a little bank in El Cerrito. I don't know whether it was that bank.

Q. You know the checks were drawn on that bank in El Cerrito?

A. Well, I believe they were.

Q. What is your best recollection? [271]

(Testimony of Joseph Billington.)

A. Well, I can't say, Mr. Campbell. I have really forgotten. I know there was a bank in El Cerrito and outside that I don't know anything about the bank, the one bank I ever heard or knew anything about.

Q. Did you know anything about any other account? A. No, sir.

Q. Do you know whether or not the returns which I read to you properly set forth the income of the 21 Club for those two years?

A. Not knowing, I couldn't say. I don't know.

Q. You don't know? A. Don't know.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Billington, you stated in your direct examination that you and Mr. Remmer, the defendant in this case, had been lifelong friends, is that correct? A. Correct.

Q. As a matter of fact, you and Mr. Remmer were little boys together? A. That's right.

Q. And played together as children and grew up together, is that correct? A. Grew up together.

Q. And for a time you were a professional boxer, were you not? [272]

A. That's right, sir.

Q. And your professional boxing name was Frankie Denny? A. That's right.

(Testimony of Joseph Billington.)

Q. And then after that you injured yourself driving an oil tank? A. Right, sir.

Q. And after a time Mr. Remmer had you go to work for him, is that correct? A. Yes.

Q. When you were requested by Mr. Remmer to sign the lease on the Menlo Club and the other properties, the Turf Tavern and the Tiny's Restaurant, isn't it a fact that Mr. Remmer told you that he wanted you to sign the lease and hold that lease in your name because he trusted you and he would be away a good deal of the time?

A. That's right.

Q. And isn't it a fact that the reason Mr. Remmer told you the reason he wanted some one he trusted, he wanted Mrs. Remmer protected in case anything happened?

A. That was his statement.

Q. And that he could rely on you to hold the property, is that correct? A. Yes.

Q. Now, he told you at that time, did he not, that he would guarantee the lease so that there wouldn't be any liability on [273] you?

A. That's right.

Q. And as a matter of fact—if I may have the Court's permission to approach the witness with an exhibit—as a matter of fact, Mr. Billington, showing you prosecution's Exhibit 51, which has been identified as the original Schriber lease, following the signature of Mr. Schriber and yourself, Mr. Remmer did sign, guaranteeing the performance of the lease, the obligations thereunder, is that correct?

(Testimony of Joseph Billington.)

Mr. Campbell: We suggest the document speaks for itself, if the Court please.

The Court: You may answer the question.

A. Yes.

Q. And Mr. Remmer also signed with you to take on the escrow agreements, which have been designated prosecution's No. 50, the escrow agreement, between Mr. Schriber and yourself, is that correct? A. That's right, sir.

Q. Now, then, did you ever make an income tax return, wherein you claimed that you had derived any benefit financially from any of the Menlo Club property or its other enterprises, such as the bar or the Tiny's Restaurant?

A. No, I never returned.

Q. You never did receive any income out of either the Menlo Club, cigar stand, restaurant or bar, is that correct? [274] A. Correct.

Q. Either by way of salary or by way of any bonus or profit, is that correct?

A. Nothing; no, sir.

Q. Now you did, however, go to work for a time at the 21 Club in El Cerrito, that has been testified to here? A. Yes.

Q. And you were more or less the floor manager of the bar and the restaurant, is that correct?

A. Right.

Q. And for that you received a salary?

A. Right.

Q. And I understood you to say initially it was \$75 a week, a little later it was increased?

(Testimony of Joseph Billington.)

A. I believe as near as I can remember that is right.

Q. A little later your recollection is that it was increased to \$100 a week? A. That's right.

Q. And then you said that you recall at one time that you received something in the neighborhood of two thousand dollars, in the nature of a bonus, based on percentage of the business?

A. I received two thousand dollars, yes, sir.

Q. And that was over and above your salary, in addition to your salary?

A. Yes, that would be. [275]

Q. You drew your salary every week and this was some bonus given to you at the end of the year?

A. That is right.

Q. And that is what you have recalled, is it, that you have made an income tax return on, showing the collection of some financial benefit by you over and above your salary? A. Yes.

Q. So you made the two returns those two years, one being your individual return on salary and the other being a partnership?

A. As near as I remember Mr. Simmons made that out.

Q. Did you direct Mr. Simmons what to do, or did you simply turn over to Mr. Simmons the income concerning your personal affairs and Mr. Simmons prepared what he considered he should prepare? A. Yes.

Q. Mr. Simmons is an accountant?

A. Yes, sir.

(Testimony of Joseph Billington.)

Q. He has a brother also, Mr. Lester Simmons, works with him? A. Yes.

Q. You are not an expert in accountancy or bookkeeping, or anything of that kind?

A. No, sir.

Q. You have been a boxer and truck driver before? A. That is correct.

Q. And you turned all your personal affairs to Mr. Simmons, the [276] accountant to be made out as they should be made out?

A. That is right.

Q. As near as you know this was a true and correct report made to Mr. Simmons as to money that passed through your hands?

A. Mr. Simmons had my tax and wages and everything.

Q. In other words, Mr. Simmons was as familiar with that as you were?

A. That is right, more so.

Q. Mr. Avakian thought you were not sure that you understood a question I asked, so I will put it to you again. In regard to the San Diego Club or the 21 Club, rather, bar and restaurant over which you had supervision as sort of a general manager, as near as you can recall now did Mr. Simmons, the accountant, receive a full and correct report on everything that was made by the place and everything that was paid by the place?

A. Yes.

Mr. Campbell: Objected to as incompetent, in view of the witness' testimony that he knew noth-

(Testimony of Joseph Billington.)

ing about the receipts of certain portions of the business.

Mr. Gillen: I am only asking for certain portions, the bar and restaurant, over which he had supervision.

The Court: You may answer the question. You may answer it after you hear it read.

(Question read.)

Q. You understand I am confining that to what you knew, not the [277] gaming room, but the bar and restaurant portion.

(Question read.)

A. Yes, sir.

Q. Now, when you answered before that Mr. Simmons was as familiar, even more so, with the profits and expenses, were you referring in your answer to the bar and the restaurant of the 21 Club?

A. Well, the bar and restaurant. As I stated, I didn't know anything about the other part.

Q. What I am trying to get at is was Mr. Simmons as familiar as you were with the money that was taken at the bar and restaurant?

Mr. Campbell: Objected to as calling for his conclusion.

The Court: Objection sustained.

Q. Did Mr. Simmons look over the accounts with you or look over the accounts very frequently of the bar and the restaurant?

(Testimony of Joseph Billington.)

Mr. Campbell: If he knows.

Mr. Gillen: Of course if he knows. I am not asking for anything he doesn't know.

A. I know I see him working on the books and just what he was doing, I can't state.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Campbell:

Q. Counsel showed you Plaintiff's Exhibit 51, the original indenture and the guarantee agreement. Did you ever read that [278] before, Mr. Billington? A. No.

Q. He also showed you Government's Exhibit 50, which you signed and is signed by Elmer Remmer. Did you ever read that before?

Mr. Gillen: Objected to as improper redirect. I didn't ask him anything about reading. I asked him if the signatures were contained and he was informed Mr. Remmer was going to guarantee these terms?

The Court: Objection overruled. What exhibit were you referring to just now?

Mr. Campbell: Referring to Government's Exhibits 50 and 51.

The Court: Let us have the question.

(Question read.)

A. No, I never read it.

Q. Now, counsel asked you relative to whether or not you had reported on your individual in-

(Testimony of Joseph Billington.)

come tax returns any of the income of the Menlo Club? A. No, sir.

Q. You did, did you not, report, however, income of Elmer Remmer from other enterprises on your individual returns.

Mr. Gillen: Just a moment. I am going to object to the question as improper redirect, and secondly as being a complex question. It is not clear.

The Court: Let us have it read again. [279]

(Question read.)

Mr. Gillen: I think I should add to that, may it please the Court, that Mr. Billington is Mr. Campbell's witness and I think Mr. Billington, as would be any other witness, is entitled to see any document from which Mr. Campbell is making reference and I submit he is attempting to cross-examine his own witness.

The Court: Objection overruled. Answer the question.

Let us have the question read so you know and understand it.

(Question read.)

Mr. Gillen: Just a moment. I would like to understand the question and I am going to object to it as a complex question.

The Court: Objection overruled. Read the question to the witness so we will understand it.

(Question read.)

A. Not to my knowledge.

(Jury and alternate jurors admonished and short recess taken at 11:05 a.m.)

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BILLINGTON

resumes the witness stand on further

Redirect Examination

By Mr. Campbell: [280]

Mr. Campbell: I was about to use this exhibit to refresh the witness' recollection.

Mr. Gillen: I would like to look at the exhibit. In the first place the exhibit is a return dated 1943, which is earlier than the time of the time boundaries of the indictment, which begins in 1944. In the second place, it is improper redirect examination and it wasn't touched upon on cross. The cross touched only the field that was explored by counsel in direct examination, and third, as I indicated before, this witness is Mr. Campbell's witness and he is now seeking to cross-examine his own witness or to impeach his own witness, I don't know which.

Mr. Campbell: That is not quite correct, your Honor. Counsel asked the witness if he had ever reported, as I recall, any of Mr. Remmer's income upon his own personal returns.

Mr. Gillen: No, that isn't the question I asked at all.

(Testimony of Joseph Billington.)

Mr. Campbell: I call on the record.

Mr. Gillen: I asked him if he ever reported receiving any income of any nature from the Menlo Club on his own individual return.

(Record read.)

The Court: At this present time we really have nothing before the Court.

Mr. Gillen: Yes we have.

The Court: No question has been propounded. He [281] indicated the purpose to show this exhibit to the witness, that is all I can recall.

Mr. Gillen: Well then, it is premature.

The Court: We will go right along for the time being and then you may interpose the same objection.

Mr. Gillen: Very well.

Mr. Campbell: I will approach the matter in another manner.

Q. I am going to show you Plaintiff's Exhibit 56 for identification and ask you if that is your individual income tax return for 1943?

Mr. Gillen: Objected to as incompetent, irrelevant, and immaterial, not proper redirect examination. Isn't within the confines of the direct examination or the cross-examination. Nothing was asked of this man concerning his income tax return for 1943, which is before the time of the indictment, either by Mr. Campbell on direct or myself on cross-examination.

Mr. Campbell: I wish to point out to your

(Testimony of Joseph Billington.)

Honor that counsel interrogated the witness as to his association with Mr. Remmer over a long period of time, as to his prior employment and activities. For that reason I believe this is material.

The Court: This question here, it seems to me, to be merely a question going to see if the witness can identify this exhibit, that is all. Objection to this question will be overruled. Now you may answer. [282]

(Question read.)

Mr. Gillen: May the witness answer yes or no?

The Court: Please answer yes or no.

A. Well, it is my signature and must possibly be the income tax for that year.

Mr. Campbell: This will be offered in evidence as Government's Exhibit 56.

Mr. Gillen: To which, of course, we offer the objection upon all the grounds heretofore urged, which your Honor thought were premature at that time, and I think properly so.

The Court: In view of the statement of Mr. Campbell, I would think it is probably not proper redirect examination.

Mr. Campbell: I then ask leave of the Court to reopen the direct examination for the purpose of offering this exhibit.

The Court: The direct examination may be reopened.

Mr. Gillen: Then we object to it on the ground it is the income tax return of this witness at a time earlier than this involved in the indictment,

(Testimony of Joseph Billington.)

may it please the Court. I would like your Honor to see the exhibit.

The Court: What have you to say on that subject, Mr. Campbell?

Mr. Campbell: Well, the exhibit on its face will show its materiality.

The Court: I mean as to the year 1943? [283]

Mr. Campbell: It will show wilfullness and a plan or scheme.

Mr. Gillen: Well, I am going to have, for the record, to assign counsel's remark in the presence of the jury, as to wilfullness conduct. I would like your Honor to see the exhibit I wonder if I could prevail upon your Honor to instruct the jury to disregard the remark of counsel.

The Court: I take that remark to be that counsel indicates that it might show a plan, rather than the word "scheme." Is that your idea?

Mr. Campbell: Yes, your Honor.

The Court: Of course, that word "scheme" has the sound——

Mr. Gillen: It is an unpleasant word.

Mr. Campbell: Well, I retract it in that sense.

The Court: I take it that you mean it might show a plan. Do you want me to see that exhibit?

Mr. Gillen: Yes, your Honor. I would like to invite your Honor's attention again to the matter that this gentleman on the witness stand, Mr. Billington, is Mr. Campbell's witness and he is apparently attempting to impeach his own witness without laying a proper foundation.

(Testimony of Joseph Billington.)

The Court: Objection will be overruled. It may be admitted in evidence.

Mr. Campbell: If I may read from this Exhibit 56, your Honor? [284]

The Court: Yes.

Mr. Campbell: (Reads Exhibit 56.)

Q. Did you, during the year 1943, operate the San Diego Social Club as your own personal business.

Mr. Gillen: To which we offer an objection, may it please the Court, that it is improper redirect examination, incompetent, irrelevant and immaterial, not within the time confines of the indictment, which commences in 1944; also that he is impeaching his own witness without laying the proper foundation. And may I say this to your Honor, counsel a moment ago, in his anxiety to be able to ask these questions of the witness, pointed out to your Honor that I had asked in cross-examination concerning this witness' long association with Mr. Remmer. Your Honor will recall that counsel——

The Court: I don't want to interrupt, but haven't we lost sight of the fact that I permitted counsel to open up the direct examination? Your objection seems to be based on the theory this is redirect.

Mr. Gillen: That is true, you did permit. May I ask your Honor then to reconsider that there is no foundation laid here to impeach this witness and the other objection I was going to make would

(Testimony of Joseph Billington.)

be defeated by the fact that you had ruled counsel could reopen.

The Court: Objection will be overruled.

(Question read.) [285]

A. Not to my knowledge.

Q. Did you have anything to do with the San Diego Social Club in 1943?

A. I think I did in 1943. I don't just remember the date when I went into the place.

Q. What was the nature of your association there, if you recall?

Mr. Gillen: Just a moment—I am going to object as having been asked and answered in the original direct examination. If your Honor will recall, it has been established here that the 21 Club and the San Diego Club were one and the same organization. That was established here yesterday by Mr. Haughey and it had been an interchangeable name, at one time the San Diego Social Club, another time called the 21 Club. Now Mr. Billington answered in his original direct examination that he had been employed there from 1943 until about September of 1945.

The Court: Objection will be overruled. You may answer the question.

(Question read.)

A. Well, as I say, it was all one business. I suppose it was all in the same building.

The Court: I don't believe the witness understood the question.

(Testimony of Joseph Billington.)

Mr. Campbell: May I reframe the question?

The Court: Yes. [286]

Q. What was the San Diego Social Club, Mr. Billington?

A. Well, San Diego Social Club and 21 Club were all the same, to my knowledge.

Q. Was the San Diego Social Club any particular part of the 21 Club?

A. Well, I guess that was the casino.

Q. I believe you testified you had nothing to do with the casino, is that right?

A. Correct.

Q. Mr. Billington, Mr. Gillen was asking you about your career as a fighter under the name of Frankie Denny. Are you generally known as Frankie Denny or as Joseph Billington?

A. Well, both names.

Q. Generally speaking, under which name are you known?

A. Well, Frankie Denny would be most.

Mr. Gillen: May it please the Court, it is our information that there was a partnership return filed in connection with this same enterprise, the San Diego Club and 21 Club, for the same year, the year 1943, and that partnership return was filed in 1947 as a result of an audit. I believe that the government has in its possession now that 1943 partnership return. I should like to see it for the purpose of possibly asking a further question or two of Mr. Billington. May we have that?

Mr. Campbell: I don't have that in my possession [287] personally. We will make a search for it.

(Testimony of Joseph Billington.)

Mr. Gillen: There are a number of accountants here and gentlemen from your department. I wonder if we might ask——

The Court: Can you inquire of any of the gentlemen?

Mr. Campbell: Yes. May this be marked for identification?

The Court: Counsel wants to see it.

Mr. Campbell: I think it should be marked for identification.

The Court: It may be marked for identification, Plaintiff's Exhibit 57.

Mr. Avakian: Your Honor, may we inquire of the prosecution as to whether they are willing to stipulate Plaintiff's Exhibit 57 for identification was filed and was based upon a report of an audit made by Internal Revenue Agent Lester T. Farley?

Mr. Campbell: No, we are not willing to stipulate.

Mr. Avakian: May we then inquire of the government if they will produce the report of Revenue Agent Glen Gould and Lester T. Farley covering operations of the 21 Club and San Diego Social Club for the year 1943?

Mr. Campbell: I submit, your Honor, these matters have no relevancy to the witness on the stand here. There may be some proper place in the proceedings for such a request on the part of counsel, but certainly not proper interrogation of this [288] witness.

The Court: Is there any objection to allowing

(Testimony of Joseph Billington.)

counsel to see the exhibit? The agents report—have you any objections?

Mr. Campbell: Those matters, of course, your Honor, are confidential government reports, just as any other working papers of the government.

The Court: Well, do you need these matters for cross-examination of this witness?

Mr. Avakian: Yes, your Honor. (Further discussion.) May we at this time request the Court to direct the prosecution to produce the document at the earliest possible time?

The Court: I will not make that order now. We will proceed. It will stay right where it is now. Proceed with the cross-examination.

Recross-Examination

By Mr. Gillen:

Mr. Gillen: We would not be prepared to continue our recross-examination of Mr. Billington at this time. May he be excused and directed by the Court to make himself available?

The Court: Yes, you will be excused temporarily.

EARL GILLINGHAM

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. Earl Gillingham. [289]

Q. Where do you live?

A. 25 Capra Way, San Francisco.

Q. What is your business?

A. Treasurer and office manager of Bullock & Jones, 340 Post, San Francisco.

Q. What is the character of business conducted by Bullock & Jones? A. Men's wear.

Q. It is a retail clothing establishment, is that correct, men's wear? A. That's right.

Q. And is this business limited exclusively to retailing men's apparel?

A. That's right. I would say yes, definitely.

Q. Have you brought with you, pursuant to subpoena, the records of Bullock & Jones relating to an account with Elmer Remmer?

A. I have.

Q. Will you produce that?

Mr. Thompson: I ask that the document be marked Plaintiff's Exhibit for identification next in order, your Honor. That will be Exhibit 58.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.) [290]

Afternoon Session—December 5, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. GILLINGHAM

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Avakian: Your Honor, before we resume with this witness, may we make two requests of the Court?

The Court: Yes, sir.

Mr. Avakian: First of all, with respect to the remark that was made by Mr. Campbell of the prosecution, regarding Plaintiff's Exhibit 57 for identification, as a return filed after the commencement of the investigation, in view of the fact that there is no such evidence in the record, we wish to assign that as misconduct on the part of the prosecution and request the Court to instruct the jury to disregard that remark.

Mr. Campbell: If the Court please, that statement was made in response to a statement made by Mr. Avakian regarding the return.

The Court: (Instructs the jury.)

Mr. Avakian: My second request is this, your Honor, Plaintiff's Exhibit 51 was produced by a gentleman whose name I do not know and we believe he has in his possession other documents material to this case. We would ask the Court for

(Testimony of Earl Gillingham.)

an order requesting that the gentleman identify himself and to [291] remain available with his evidence until such time as he is excused by the Court.

The Court: That request will be denied. I think the state of the record is this gentleman is under direct examination.

Q. Mr. Gillingham, I show you Plaintiff's Exhibit 58 for identification, which consists of a transcript of an account in two pages and three pages of typewritten information on account paper. Will you state whether or not those documents are records of Bullock & Jones of San Francisco?

A. These first two sheets are original ledger sheets of Mr. Remmer's ledger account. The three typewritten sheets are merely summary of the original sheets, the regular ledger sheets.

Q. The last three sheets are copies which you have made from the original ledger sheets?

A. That is correct.

Q. And are those original ledger sheets records of Bullock & Jones kept in the ordinary and regular course of the conduct of its business?

A. They are.

Q. And is it part of the business of Bullock & Jones to keep and maintain records of that character?

A. Yes, it is.

Mr. Gillen: May it please the Court, in the interest of time, the defense is willing the exhibit may be offered in evidence without objection and in the interest of clarity or [292] simplifying the exhibit and accommodating Bullock & Jones, the

(Testimony of Earl Gillingham.)

summary will be acceptable to the defendant, with this exception, I notice there are some pencil notations made on the bottom of the sheet, I do not know by whom they are made, but they appear to be immaterial and I suggest that they be erased or covered.

Mr. Thompson: That is satisfactory. I can ask the Court to erase those.

The Court: Exhibit 58 is admitted in evidence, of course, with the pencil remarks erased.

Q. Mr. Gillingham, I show you Plaintiff's Exhibit 58, is that the account of Mr. E. Remmer with Bullock & Jones for the years 1944, 1945, and 1946? A. It is.

Q. And what information on the account is given under the column date?

A. The date of purchase and date of cash payments.

Q. What information is given under the next column of the exhibit?

A. One column is debits, the next column is credits.

Q. By the next column of the exhibit, I refer to the second column. A. Second column.

Q. Left-hand side of the exhibit, what information is given?

A. Information of cash payment and article which was bought. [293]

Q. What information is given under the column DR.? A. Those are charges.

Q. Charges to the account?

(Testimony of Earl Gillingham.)

A. Charges to the account.

Q. And what information is given under the column Cash CR.?

A. That includes all credits credited to the account of Mr. Remmer.

Q. Under the second column of the exhibit we find notation under date of 12-28-44, M. O. 7088-9.

A. That is merchandise order.

Q. And what is a merchandise order?

A. A merchandise order is order for merchandise, the amount of which is determined by the purchaser and is made payable to the customer, made payable to the person who presents the merchandise order, made payable to the bearer.

Q. So far as Bullock & Jones is concerned, any one that brings in a merchandise order issued by Bullock & Jones, he delivers that to the company in exchange for merchandise of the same value?

A. That's right.

Mr. Thompson: Your Honor, with the Court's permission, I would like to read Exhibit 58.

The Court: Yes.

Mr. Thompson: (Reads Exhibit 58.) You may cross-examine. [294]

Cross-Examination

By Mr. Gillen:

Q. Mr. Gillingham, where it is noted on the transcript of the account which you furnished the court and which is now called Plaintiff's Exhibit 58, the reference to cash and the amount opposite

(Testimony of Earl Gillingham.)

the date means there has been a payment or credit noted on that account?

A. 1946, it means that there has been a credit, a cash credit, and also—1946 was all cash, that's right.

Q. That means there has been a payment made on the account?

A. Payment has been made, that is right.

Q. You don't know whether it is payment by check or payment by cash, you can't tell from that?

A. No, I cannot.

Q. These might have all been checks?

A. That is right.

Q. You simply put it down to cash to indicate it is payment on account of money rather than merchandise?

A. That is right. If it is return of merchandise we would note it, so indicated.

Q. Now, the merchandise orders that you have referred to here are the common merchandise orders we are all familiar with when you give an order for 20 or 25 dollars and they go and select whatever merchandise they desire themselves?

A. That is correct.

Q. How long have you been connected with Bullock & Jones? [295]

A. Well, since October, 1929.

Q. And before that you were in the clothing business, also?

A. No. I was in the automobile business.

Q. In your experience in the clothing business

(Testimony of Earl Gillingham.)

since 1929, it has been your experience, has it not, that usually people buy merchandise orders for gifts to other people, is that right?

A. That is correct.

Q. It is very uncommon at all that people buy merchandise orders for themselves?

A. That is right.

Q. I noted that in the figures that were read out by Mr. Thompson, there were some odd amounts, for example, merchandise order for \$23.60, another merchandise order, or several of them, for \$10.81. Let me ask you if that contemplated covering the California sales tax?

A. I presume that does, yes.

Q. In other words, three per cent sales tax on the purchase of merchandise?

A. Yes.

Q. I notice some other merchandise orders where they were for over \$100 without any odd figure attached, that is for \$100—can you enlighten us on that? What would that mean? Would that mean that the customer had a merchandise order for \$100 and he would have to pay his own sales tax?

A. That is quite possible. [296]

Q. Or buy less than \$100 worth of merchandise to have his sales tax covered, is that right?

A. That is right.

Q. I notice there was one item in the year 1944, in the month of December, merchandise order—I beg your pardon—yes, merchandise order \$250, but it gives the designation M.O. No. 7088-9, that means that that was two merchandise orders, does

(Testimony of Earl Gillingham.)

it not? Is that correct? A. That is correct.

Q. So each merchandise order might have been for \$125, making a total of \$250?

A. That is correct.

Q. I notice also in an item on the 19th of December, 1945, there is at the bottom of the column a notation of M.O. 8221-4, \$400; that would indicate, would it not, that there were four merchandise orders in that instance? A. That is right.

Q. Probably for \$100 apiece?

A. That is correct.

Q. On the matter of the items of "hat renovated, \$5.00," does that mean where a man brings in a hat and has it blocked and cleaned and new band and make it last another year?

A. That is right, that is complete renovation.

Q. I wonder, Mr. Gillingham, if you have handy there the total of the merchandise orders that were purchased on this account [297] each year?

A. Repeat that, please.

Q. I wonder if you have totaled the merchandise order items? Have you done that?

A. The total of the merchandise orders year by year?

Q. Yes.

A. It is right on that summary sheet I gave you.

Q. Are those your pencilled notations?

A. Yes.

Q. I am sorry we had those rubbed out, Mr. Gillingham. May I approach the witness with the exhibit. Your eyesight is good, Mr. Gillingham, you might be able to solve some of this and I will give

(Testimony of Earl Gillingham.)

you a piece of paper. Would you be kind enough to total the merchandise orders?

A. You want them year by year?

Q. If you please.

A. The year 1944, \$250; 1945, \$505.33; 1946, \$416.34.

Q. Do you have that total, Mr. Gillingham?

A. Of all of that?

Q. Yes. A. \$1,171.67.

Q. So that he purchased \$1,171.67 worth of merchandise orders? A. That's right.

Q. Now is it true that there are reflected upon your records there that in all over that three-year period the total cash [298] payments amounted to \$1,323.61? A. We have this total paid, yes.

Q. The over-all total?

A. Yes, that is right.

Q. Mr. Gillingham, do you have any knowledge of whether or not these merchandise orders were purchased as gifts for business associates or employees?

A. I wouldn't know for what purpose they were bought.

Mr. Gillen: I think that is all, thank you.

Mr. Thompson: That is all.

(Witness excused.)

JOHN C. McCaffery

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. John C. McCaffery.

Q. Where do you live?

A. 19 Stuyvant Circle, New York, New York.

Q. By whom are you employed?

A. A. Sulka & Company.

Q. What is the character of the business operated by A. Sulka & Company?

A. Haberdashery and custom merchandise.

Q. Is that for both men and women, or just men? [299]

A. For men, sir.

Q. And what cities of the United States do you operate merchandise businesses?

A. New York, Chicago, and in the wintertime we have a Palm Beach office.

Q. Where is your business located in New York?

A. 661 Fifth Avenue.

Q. Where is it located in Chicago?

A. Michigan & Madison, Chicago.

Q. What is your position with A. Sulka & Company?

A. I am manager of the department of accounts.

Q. How long have you been so employed?

A. I will be there three years this coming May. I now will be two and one-half years.

Q. Have you brought with you, pursuant to sub-

(Testimony of John C. McCaffery.)

poena, certain records of A. Sulka & Company relating to an account with Elmer Remmer?

A. Yes, I have.

Q. Will you produce them, please?

A. Certainly.

Mr. Thompson: I ask that the documents produced by the witness be marked Plaintiff's Exhibit 59 for identification.

The Court: So marked.

Q. Mr. McCaffery, you have produced original records and also made a typewritten transcription of them? [300]

A. That is correct, sir.

Mr. Gillen: In the interest of time, your Honor, the defense is prepared to stipulate, if counsel is desirous of offering this Exhibit 59 in evidence, there will be no objection and at his convenience, if he desires to offer the transcription from the original ledger sheets, there will be no objection.

Mr. Thompson: We offer Exhibit 59 in evidence, your Honor.

The Court: The exhibit includes both the transcript sheet and the copy of it?

Mr. Gillen: Yes, your Honor.

The Court: It will be admitted in evidence.

Q. Mr. McCaffery, Plaintiff's Exhibit 59 consists of the account of Mr. Elmer Remmer with A. Sulka & Company in its New York store and Chicago store for the years 1944, 1945, and 1946, is that correct?

A. That is correct.

Q. And in the first column of each of these pages is given a date upon which the transaction took place?

A. That is correct.

(Testimony of John C. McCaffery.)

Q. What information is given in the second column under the heading of "Account Rendered and Item"?

A. The second column is itemization of merchandise purchases and payments for it.

Q. What is given under the third column, [301] charges?

A. That is record of the purchases made.

Q. And the amounts charged for each purchase?

A. That is correct.

Q. And what information is given under the column headed "Credits"?

A. The column headed "Credits" covers merchandise returned and payments made.

Q. What information is given under column "Pay Last Amount in This Column"?

A. That is the balance.

Q. Will you examine the exhibit and state whether or not any payments were made on account of return of merchandise?

A. There is no return of merchandise.

Q. And all items under the column headed "Credits" represent payments by the purchaser?

A. Payments made, that is correct, sir.

Q. Are you able to tell whether those payments were made by cash, check or some other form?

A. Yes, sir. The payments made are designated whether by check, money order or cash.

Mr. Thompson: I would like to read this exhibit to the jury, your Honor. (Reads Exhibit 59.)

(Testimony of John C. McCaffery.)

Q. Mr. McCaffery, is a cravat sometimes known as a necktie? A. That is correct, sir.

Mr. Thompson: You may cross-examine. [302]

Cross-Examination

By Mr. Gillen:

Q. You were subpoenaed, Mr. McCaffery, all the way from the New York office?

A. That is right, sir.

Q. With these records?

A. That's right, sir.

Q. On Exhibit 58 in evidence, which the defense stipulated could be put in evidence, I note in red typewriter ribbon a number of items giving credits under the designation of "Money Order." You recall those, do you not? A. I do, sir.

Q. Now I notice on your original cards, in connection with those money order credits, that there was also on your card c.o.d., that means cash on delivery, does it not? A. That is correct.

Q. So that in the transcript that you prepared here to facilitate the reading or interpretation of these original ledger sheets, when you put down money order, you didn't mean Mr. Remmer sent a money order to you? A. No, sir.

Q. But rather the merchandise was shipped from New York or Chicago to San Francisco or elsewhere on c.o.d. order? A. That is correct.

Q. And it was shipped by postal service, where the postman collected the amount of the charge at the time of delivery? [303]

(Testimony of John C. McCaffery.)

A. That is right, to be shipped parcel post and payment to be made through the postoffice.

Q. And your company received payment from the postoffice in the form of money order, is that correct? A. That is correct.

Q. And how Mr. Remmer paid for those c.o.d packages, you don't know?

A. That is correct, sir.

Q. Let me ask you this, does your firm do quite a large Christmas business?

A. Yes, a very large Christmas business.

Q. And lots of people come in there and buy large orders of things to give away to business associates and employees and so on?

A. That is correct, sir.

Q. From your experience in this business, it would appear, would it not, that when there were purchases under the account of Elmer Remmer on December 5, 1946; 350 cravats, meaning 350 neckties, and additional 50 cravats, meaning an additional 50 neckties, or altogether 400 neckties, it would appear that these were Christmas gifts, would it not? A. That would be my reaction.

Q. You wouldn't expect a man to buy that many cravats for his own neck?

A. That is correct. [304]

Q. I take it that it is your experience during the month of December is the time when your Christmas business becomes pretty active?

A. That is correct, sir.

Q. I wonder if you would be kind enough, Mr.

(Testimony of John C. McCaffery.)

McCaffery, if you haven't done it already, if you would be kind enough to total the necktie purchases for the last three years, and it will be entirely agreeable with the defense, in order not to take up the Court's or jury's time, to have Mr. McCaffery do this and return to the stand when he has it completed, if you desire to go ahead with something else.

The Court: Very well.

Mr. Gillen: Other than that we have concluded our cross-examination.

The Court: Will you kindly do that?

A. I have the dollar breakdown here. I want to make sure what you wanted.

Mr. Gillen: The number of ties. I wonder if you would be kind enough to show us the number of neckties purchased each year and totals each year and grand total of neckties and grand total of money, if you please. A. Yes, sir.

Mr. Gillen: We have completed our cross-examination.

The Court: Have you any further questions?

Mr. Thompson: No, your Honor. [305]

The Court: After these totals are given, may the witness be finally excused?

Mr. Gillen: Yes.

RAMONA TINKLER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Ramona Tinkler.

Q. Where do you live, Miss Tinkler?

A. 791 Fourteenth Avenue, San Francisco.

Q. Where are you employed?

A. In the Alcohol Tax Unit of the Bureau of Internal Revenue in San Francisco.

Q. How long have you been employed by the Alcohol Tax Unit of the Bureau of Internal Revenue in San Francisco?

A. I have been in the Bureau of Internal Revenue thirty years, but not all with the Alcohol Tax Unit.

Q. How long have you been with the Alcohol Tax Unit?

A. Since its organization in 1934, I think.

Q. What is your present position with the Alcohol Tax Unit?

A. I am secretary to the Assistant Supervisor.

Q. Are you familiar with the procedure in the office of the Alcohol Tax Unit for the past several years, relating to the filing of floor stock tax returns on alcoholic liquors? [306]

A. Yes, I think so. Form 758 is filed by the taxpayer in duplicate with the Collector of Internal Revenue, with the payment of the tax due. The

(Testimony of Ramona Tinkler.)

Collector then sends the duplicate, with the inventory—the inventory is attached to the original and duplicate, too—and the Collector sends the duplicate with the inventory to the Alcohol Tax Unit for auditing and then they are filed in our office.

Q. And by inventory do you refer to the inventory of the liquor upon which the tax is computed and paid?

A. Yes, the liquor that is on hand at the time the tax is paid.

Q. Have you brought with you from the San Francisco office of the Alcohol Tax Unit, a return filed showing the payment of floor stock tax on certain Gallagher & Burton whiskey?

A. Yes, I have.

Mr. Thompson: May the return produced by the witness be marked plaintiff's exhibit next in order, No. 60?

The Court: It may be so marked.

Mr. Gillen: In regard to Plaintiff's Exhibit 60 for identification, may it please the Court, the defense is prepared to stipulate that this may be introduced in evidence, if the prosecution so desires, subject, however, to the defendant's right to object to the same and move to strike in the event that it is not connected up with the defendant in any material respect.

The Court: Will counsel accept that stipulation?

Mr. Thompson: Yes, your Honor. [307]

The Court: Very well. It will be admitted, subject to motion to strike in the event it should not be connected.

(Testimony of Ramona Tinkler.)

Mr. Thompson: Your Honor, we would also at this time like to offer in evidence Exhibit 15 for identification, which is the other duplicate of that same return filed with the Nevada collector.

(Discussion by counsel.)

The Court: It may be admitted in evidence, Exhibit 15.

Q. Miss Tinkler, referring to Plaintiff's Exhibit 60, what does the first page of that exhibit consist of, constitute?

A. A return of floor stock tax on distilled beer and malt liquors and wines under the Revenue Act of 1943.

Q. By whom was the return made?

A. You mean the name of the business?

Q. Yes.

A. It was made for Cal-Neva, Incorporated, Lake Tahoe, for retail liquor dealer.

Q. And by whom was it signed?

A. It was signed Cal-Neva Lodge, Inc., Elmer Remmer, president. It was filed with the Collector of Internal Revenue at Reno.

Q. And what is the amount of floor stock tax reflected?

A. \$7,853.18.

Q. Does the return show whether or not that tax was paid?

A. Yes, the Collector's stamp is "Received with remittance [308] May 19, 1946, Collector of Internal Revenue, District of Nevada."

(Testimony of Ramona Tinkler.)

Q. Does the return show the total gallonage of distilled spirits involved?

A. Yes, under quantity it shows 2,493.072 distilled spirits proof gallons.

Q. And attached to the first page of the exhibit is an itemized inventory of the liquor referred to on the first page, is that correct?

A. Yes, 1,194 cases.

Q. 1,194 cases. Does it show of what brand of liquor?

A. The entire 1,194 cases is Gallagher & Burton bourbon. The company has no wine or beer.

Q. On the third page of the inventory does it show what kind of liquor Gallagher & Burton was?

A. Well, there is a notation in pen, "Whiskey all 5ths, 86.8 proof."

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Miss Tinkler, the inventory which is attached to Plaintiff's Exhibit 60 in evidence, is that prepared by your office or an inspector of your office?

A. Probably by the taxpayer.

Q. It is checked by agents of your office to determine the accuracy of the inventory?

A. I don't know. [309]

Q. Now in the 1,194 cases, I note at the top of the first page of the inventory a notation, "46 cases damaged." Do you know whether or not that means that those cases were destroyed or whether the 1,194 would be over and above the 46 cases damaged?

(Testimony of Ramona Tinkler.)

A. No.

Q. Would you look at that inventory and tell me, isn't that an inventory by someone in your office? When I say "your office" I mean in the Tax Unit office?

A. I don't understand that question.

Q. The inventory itself. A. Yes.

Q. Would you look at that and tell me whether or not that isn't prepared by some field agent out of the Alcohol Tax office?

A. I don't know. My understanding is that all inventories attached to Form 758 are prepared by the taxpayer.

Q. And accepted without check of a field agent by your office?

A. Well, they might be checked later.

Q. Now this exhibit would reflect to you—looking at it as a government document—would reflect to you that this was the report or return on floor tax of the Cal-Neva corporation?

A. Cal-Neva Lodge, Incorporated.

Q. That that whiskey belonged to, and the obligation to pay the floor tax, was upon the corporation, is that correct?

A. Yes, signed by the president of the corporation.

Q. Is there any requirement by the government that that should [310] be signed by any officer of the corporation? A. I don't know.

Q. It doesn't designate who should have to sign it?

(Testimony of Ramona Tinkler.)

A. The taxpayer—"Whether taxpayer or corporation, state whether individual owner or member of firm or officer of corporation and give title of officer of corporation."

Q. So any officer of the corporation could sign that?

Mr. Thompson: Objected to as calling for her legal conclusion.

The Court: Objection sustained.

Mr. Gillen: It was my impression that this lady was asked as an expert in this office about the meaning of the document. That is why I am pursuing it further.

The Court: Well, on this question, I think that is a matter the statute will explain. You will find the answer in the statute.

Q. Now I will ask you to look at this exhibit again, No. 60, and note particularly under "Subscribed and sworn to before me this 19th day of May, 1944," the name of J. R. Bastian, D. C., below it, where it says, "Official Title." Can you tell us, if you know, what that signature means, what D. C. means?

Mr. Campbell: We will stipulate that refers to the deputy collector for the District of Nevada.

Mr. Cillen: All right, we accept that stipulation.

Q. Now let me ask you to look at the signature again and the [311] date that is written there, "J. R. Bastian" and D. C. and date, and compare with the other handwriting on that date and tell

(Testimony of Ramona Tinkler.)

us if it doesn't appear to be written by the same person.

Mr. Campbell: Objected to as calling for her conclusion. She is not qualified as an expert. The document will speak for itself to any one as well as to her.

The Court: She may answer the question. Objection overruled.

A. I wouldn't know.

Q. You notice there was a notation made at the bottom of the total of the tax due, 5 per cent penalty, \$373.96, and a total of \$7,853.18. Does that assist you in determining whether or not that was made out by the deputy collector or whether it was made out by the Cal-Neva Lodge Incorporation?

A. I wouldn't know.

Q. Well, you are satisfied, are you not, that the taxpayer wouldn't have made out a penalty to himself? A. I don't know.

Q. You know the penalty for any delinquent payment is fixed by the collector?

A. I don't have anything to do with figuring tax.

Q. Tell us what you know about collecting floor tax.

Mr. Campbell: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained. [312]

Mr. Gillen: May I respectfully suggest to your Honor it is my understanding I may cover the exact ground covered by direct examination.

(Testimony of Ramona Tinkler.)

The Court: Yes. What do you know about the practice of law, suppose somebody asked you that question? You could talk for a long time and I think this witness could talk probably as long.

Q. Now, Miss Tinkler, you did state that such a form as you hold in your hand there, with the inventory attached, is the form that is used by the Alcohol Tax Unit of the Internal Revenue Department for the collection of a floor tax of liquor on hand, is that correct?

A. Used by the Internal Revenue Service.

Q. And when that return is made, the law is that the payment of the tax due should be paid at the same time?

Mr. Campbell: Objected to as calling for legal conclusion.

The Court: Let me have that question.

(Question read.)

The Court: She may answer the question if she can.

A. I don't know whether that is the law. I think that is the way it is handled.

Q. Didn't you testify that it is made out in duplicate, that Form 758 must be filed in duplicate with the remittance in the amount of the tax shown on the return, isn't that so? [313]

A. That is my understanding.

Q. What is? A. That is the procedure.

Q. And then I believe you identified that document by saying that the return was made and there

(Testimony of Ramona Tinkler.)

was acknowledgment of remittance in the amount due, namely in the amount of \$7,853.18, noted as having been received or paid on May 19, 1944, is that correct?

A. That is the Collector's notation on it.

Q. And you will note also there was imposed on the tax that was due a delinquent penalty of five per cent of the tax due, isn't that true?

A. I don't know whether that is delinquent penalty or not. It is 5 per cent penalty.

Q. It states it is 5 per cent penalty, isn't that correct?

A. It states in the form.

Q. And adds some 300 odd dollars, isn't that so?

A. \$373.96.

Q. Isn't it within your knowledge customarily for deputy collectors of Internal Revenue to make out a return for taxpayers or to assist in making out of returns of taxpayers?

Mr. Campbell: Objected to as improper cross-examination. This witness testified she was employed with the Alcohol Tax, not by the Collector's office.

The Court: Objection sustained. [314]

Q. You receive those returns back in your office, do you not?

A. Yes.

Q. Do you have any knowledge on the subject of whether or not the tax collector prepares those returns and imposes the penalties when penalties are due?

Mr. Campbell: Objected to as not the best evidence.

(Testimony of Ramona Tinkler.)

The Court: Same ruling.

Q. What penalties are connected with the failure to make payment on floor tax in time?

Mr. Campbell: Objected to.

The Court: Objection overruled.

A. I don't know.

Q. Are there any penalties imposed for the failure to comply with the requirements that you set forth here in your direct examination, namely, that Form 758 must be filed in duplicate with payment of the tax due remitted at the same time?

Mr. Campbell: Objected to on the ground she has stated she didn't know.

The Court: Let her answer the question if she can.

A. I don't know anything about the penalties. I don't know what the law says about the penalties.

Q. You know there are penalties?

Mr. Campbell: Objected to as argumentative.

Mr. Gillen: Of course it is argumentative. It is cross-examination. May I finish my question? [315]

The Court: Go ahead.

Mr. Gillen: I will restate the question.

Q. From your thirty years' experience with the Bureau of Internal Revenue and from your personal experience with the Alcohol Tax Unit of that Bureau since its inception in 1934, has the course of your work and knowledge of preparation to qualify yourself for that work, brought to your attention that there is a penalty attached for failure to pay alcohol floor tax?

(Testimony of Ramona Tinkler.)

A. Well, I don't have anything to do with the——

Q. (Interrupting): I am asking if you have any knowledge whether or not there are penalties attached to a failure to comply with the requirements of Form 758?

Mr. Campbell: Objected to as immaterial whether or not she knows.

The Court: She can answer the question.

A. I don't know that there are penalties.

Q. You don't know whether there are any penalties to it?

A. I don't have anything to do with it.

Q. Regardless of whether you have anything to do with it or not, you don't know whether there is any penalty imposed?

A. I assume there is, but I don't know anything about them.

Q. Do you have any knowledge what a five per cent penalty is imposed for? A. No, I do not.

Q. Do you have any knowledge of what penalty is imposed, if any, [316] if you fail to file your return in time by the fixed or required date?

A. No.

Q. Do you have any knowledge what any penalty is imposed for?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Q. In connection, I mean with floor tax?

The Court: The ruling will stand. I think you have covered the ground on that point.

(Testimony of Ramona Tinkler.)

Mr. Gillen: With the Court's permission, I would like the jury to see the first page, all for that matter, but particularly the first page of prosecution's Exhibit 60. May I pass it to each one of the jurors?

The Court: You may. Does that conclude your cross-examination?

Mr. Gillen: I believe.

The Court: Have you any further questions?

Mr. Thompson: No, your Honor.

(Witness excused.)

Mr. Gillen: I had intended to mention, if I did not mention, that I would like the jury, in examining the exhibit, to note the similarity in handwriting between the signature of the Deputy Collector and the addition of figures and filling in of the form.

The Court: Are you ready to proceed? [317]

Mr. Gillen: I believe Mr. McCaffery is prepared now.

JOHN C. McCAFFERY

resumes the stand on further

Recross-Examination

By Mr. Gillen:

Q. Mr. McCaffery, at the conclusion of your cross-examination, I requested that you further enlighten the jury the total, year by year, the number of cravats or neckties that were purchased from your firm for Elmer Remmer's account, plus amount

(Testimony of John C. McCaffery.)

of money paid for those ties for each year, and then also, if you will, give us the grand total of number of articles of merchandise and cost of merchandise.

Have you done that, sir? A. Yes, I have.

Q. Would you be kind enough to give us the results?

A. 1943, 18 cravats, \$108 in New York. No purchase of cravats in Chicago. That is total of \$108 for 1943. In 1944, 42 cravats in New York, \$252; 36 cravats in Chicago, \$216. That is total of 78 cravats for 1944, at a total of \$468. In 1945, 36 cravats in New York at amount of \$204; 24 cravats in Chicago at amount of \$144, which is a total of 60 cravats in 1945, with a total of \$348. In 1946, 504 cravats purchased in New York for \$3,611. No cravats purchased in Chicago. Total of 504 cravats for 1946, with a total of \$3,611. Do you want the total of all cravats?

Q. Yes. I asked you for the totals of 1944 to 1946, which are the years we are concerned with. You gave us the year [318] 1943.

A. The only reason I mentioned the \$108, payment in 1944, that covered 1943 purchases.

Q. May have been purchased in late 1943?

A. Sir, it was purchased October and November, 1943.

Q. Now your statement of \$3,611 for 1946, was any part of that paid in 1947, can you tell us?

A. Repeat the question.

Q. Your last bill for 1946, you give a total of merchandise purchased \$3,611.

(Testimony of John C. McCaffery.)

A. That is right, sir.

Q. For 1946; was any of that 1946 bill paid in 1947? A. No, sir; that is paid in 1946.

Q. When in 1946? A. December 27th.

Q. All right. Now would you give us the totals, please?

A. The 660 cravats that I have, I have to deduct the 18 in 1943, that I mentioned; in other words, that is 642 cravats.

Q. For the three years, 1944, 1945, and 1946?

A. That is right, sir.

Q. And then the total would be your total less \$108? A. That is correct.

Q. What was your total?

A. Well, sir, the total I had was \$4,535.

Q. And that included the \$108 in 1943? [319]

A. That is correct.

Q. So if we deduct that, we get the exact amount for the three years we are interested in?

A. That is correct. That would be \$4,427.

Mr. Gillen: I think that is all.

(Jury and alternate jurors admonished and recess taken at 2:30 for 15 minutes.)

2:45 P.M.

(Defendant present.)

(Presence of the jury and alternate jurors stipulated.)

HARRY E. STEWART

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your full name, please?

A. Harry E. Stewart.

Q. Where do you live? A. Reno, Nevada.

Q. How long have you lived in Reno, Nevada?

A. About 62 years.

Q. Do you own and operate a business in Reno, Nevada? A. I do.

Q. What is the name of that business?

A. Nevada Transfer & Warehouse Company.

Q. How long have you operated that business?

A. Forty-four years. [320]

Q. What is the nature of that business?

A. Well, a general trucking movement, transportation of household goods and storage of miscellaneous articles, merchandise and household goods.

Q. During the years 1943 to 1947, inclusive, did you have occasion to receive for storage a quantity of Gallagher & Burton whiskey? A. I did.

Q. Have you produced with you in court the

(Testimony of Harry E. Stewart.)

records of the Nevada Transfer & Warehouse Company relating to the storage and disposition of that liquor? A. Yes, sir.

Q. Mr. Stewart, you have handed me two records which have been marked Plaintiff's Exhibit 61 for identification, will you state generally the nature of the records, without stating what information is contained on them?

Mr. Gillen: I wonder if we might see them.

Mr. Thompson: I am doing that for counsel's assistance, your Honor, so he will know what the records are.

A. This larger sheet is inventory sheet, or a physical inventory of numbers of cases received and distributed. The yellow card is a combined physical record, as well as a financial cash record.

Q. Mr. Stewart, I hand you Plaintiff's Exhibit 61 for identification. Are those records of the Nevada Transfer & [321] Warehouse Company which are kept and maintained by the company in the regular operation of its business?

A. They are.

Q. Those are the original records?

A. They are, sir.

Q. And is it part of the business of the company to keep and maintain records of that character?

A. Yes, sir.

Mr. Thompson: I offer Exhibit 61 in evidence, your Honor.

Mr. Gillen: To which we will offer an objection, your Honor, unless there is a better foundation laid.

(Testimony of Harry E. Stewart.)

The exhibits bear three different names and I think that further interpretation or some clarification will have to be made. It would appear to me that there is considerable matter contained in this exhibit which would not affect or have any connection with the defendant in this case. It appears to be record of the storage of liquor and delivery of liquor to three different persons or corporations and a better foundation should be laid.

Mr. Thompson: If the Court please, I am perfectly willing to ask the witness to testify from the exhibit, but it is my understanding the exhibit should be received in evidence before he testifies regarding to explain the entries on it. The foundation of business record is laid and that is all that is required at this time. [322]

The Court: You might ask him a question in regard to any circumstances that might be pertinent to the issues here.

Q. Mr. Stewart, referring to Exhibit 61 for identification and the storage of liquor reflected by that exhibit, for whose account was the liquor stored originally?

A. Originally for Cal-Neva Lodge, Inc., E. R. Remmer; later transferred to the Bank Club at Reno, Nevada.

Q. Upon whose order was the liquor delivered from the Nevada Transfer & Warehouse Company?

A. Signature of Remmer, up to the time it was transferred to the Bank Club; after that to the Bank Club.

(Testimony of Harry E. Stewart.)

The Court: I think that would cover the objection. Exhibit may be admitted in evidence.

Q. Mr. Stewart, referring to Exhibit 61, what date was the liquor received by the Nevada Transfer & Storage Company for storage?

A. December 30, 1943, we received 1194 cases Gallagher & Burton 5ths whiskey.

Q. Upon what dates and to whom were deliveries of that whiskey made out of the storage?

A. Under date of June 30, 1944, one hundred cases; July 12, 1944, one hundred cases.

Q. Would you please state to whom or to what firm your delivery was made? [323]

A. I thought I might accomplish that by mentioning the name once. Going over it again—on June 30, 1944, first delivery of 100 cases delivered to the Cal-Neva Lodge truck on order presented by the driver and signed E. Remmer. On July 12, 1944, 100 cases was delivered to the same truck on order signed by E. Remmer. On 9-10, 194 cases was delivered to the Cal-Neva Lodge truck on order signed by E. Remmer and delivered to the driver of said truck.

Q. What was the year? A. 1945.

Q. That last one was September 10, 1945?

A. Right. On May 9, 1946, Cal-Neva Lodge truck driver showed up at the warehouse and delivered to us, for account of Cal-Neva Lodge, 100 cases of Gallagher & Burton whiskey, bringing it up to a total of 900 cases. At that time, according to this record, the driver brought with him an order

(Testimony of Harry E. Stewart.)

signed by E. Remmer, transferring the 900 cases to the Bank Club.

Q. How many cases of whiskey remained in storage on December 31, 1946?

A. May I ask as a clarification for whose account?

Q. In storage under this inventory?

A. In storage under this inventory there was 750 cases.

Q. For whose account were you holding that at that time?

A. Bank Club at Reno.

Q. Have you brought with you the order you refer to relating to [324] the transfer of the balance of the merchandise to the Bank Club?

A. Yes, sir.

Q. Mr. Stewart, you have handed me the order referred to and it has been marked plaintiff's Exhibit 62 for identification. Is that the original order to which you referred?

A. Yes, sir.

Mr. Thompson: I offer it in evidence, your Honor.

The Court: It may be admitted in evidence, Exhibit 62.

Mr. Thompson: It reads as follows: "Please release 900 cases of liquor to the Bank Club. E. Remmer, Cal-Neva Lodge."

Q. I notice, Mr. Stewart, the order is undated. Will you please state how you fix the date of that order?

A. According to the physical inventory record on this larger sheet, the driver who brought in

(Testimony of Harry E. Stewart.)

the 100 cases, listing the inventory from 800 to 900, brought this order with him. By the use of this record here made up by one of my employees at the time, indicates that that was the date.

Q. And what was the date on which the driver brought in the 100 cases to your warehouse?

A. May 9, 1946.

Q. And on that date, upon receipt of that 100 cases, you then had in storage 900 cases, is that correct? A. Correct.

Q. Now later on during the year 1946 were any cases released [325] out of storage?

A. Yes, November 26, 1946, 150 cases were released.

Q. And to whom? A. To the Bank bar.

Q. And so on December 31, 1946, you then had in storage 750 cases, is that correct?

A. That is right, sir.

Q. Will you produce, if you have it, the order releasing 150 cases to the Bank Club?

A. I can show you a receipt. The order would be phoned to my office.

Mr. Thompson: I ask that the receipt be marked plaintiff's exhibit next in order. I offer plaintiff's Exhibit 63, the receipt from the Bank Club, your Honor, in evidence.

Mr. Gillen: We offer objection to that, may it please the Court, as incompetent, irrelevant and immaterial. The basis for the objection is this—we feel that after a transfer was made of the 900 cases to the Bank Club from the Cal-Neva Club, that

(Testimony of Harry E. Stewart.)

anything the Bank Club did thereafter in the way of withdrawing its own liquor from the warehouse—they apparently became possessed of it—would not be binding in any way on the defendant. What the Bank Club did in withdrawing this liquor after that, we think would be incompetent, irrelevant and immaterial.

Mr. Thompson: If the Court please, we intend to connect [326] it up later. We will withdraw our offer so long as it is understood that the only objection reserved is that one connecting it up.

The Court: If you withdraw the offer, counsel may make any objection that might occur to them.

Q. Mr. Stewart, plaintiff's Exhibit 63 is the original receipt taken from the files of the Nevada Transfer & Warehouse Company relating to the delivery of 150 cases of Gallagher & Burton whiskey? A. Yes, sir.

Q. And it is part of the business of the Nevada Transfer & Warehouse Company to keep and maintain records of this character? A. Yes, sir.

Q. And this particular record, Exhibit 63, was made, kept and maintained by the Nevada Transfer & Warehouse Company in the regular course of the operation of its warehouse business?

A. That's right, sir.

Q. Have you produced also, Mr. Stewart, the inventory of the 1194 cases of liquor in storage, Showing the serial numbers of the cases?

A. Yes, sir.

Q. May I have it please? A. Yes, sir.

(Testimony of Harry E. Stewart.)

Mr. Thompson: I ask that this inventory be marked Exhibit [327] 64 for identification, your Honor.

The Court: So marked.

Q. Mr. Stewart, I hand you Exhibit 64 for identification. Will you state what it is, please?

A. The serial numbers on the 1194 cases of liquor taken by my employees at the time the liquor was delivered to the warehouse.

Q. Is this also a record of the Nevada Transfer & Warehouse Company which is kept and maintained in the regular course of the operation of its business?

Q. It is requirement of the Alcohol Tax Unit, complied with by the Nevada Transfer & Warehouse Company.

Mr. Thompson: I offer it in evidence, your Honor, Exhibit 64.

The Court: It may be admitted in evidence.

Q. Mr. Stewart, do your records show from whom you received delivery of the 1194 cases of whiskey for storage?

A. Yes, sir, received from the Sierra Wine & Liquor Company at the plant, loaded on to our trucks and brought to the warehouse.

Q. And will you state again the date of that delivery from the Sierra Wine & Liquor Company?

A. December 30, 1943.

Q. Now during the period of the storage of that whiskey, from the date it was received until December 31, 1946, what payments, if any, did Nevada

(Testimony of Harry E. Stewart.)

Transfer & Warehouse Company receive on [328] account of the storage and other charges?

Mr. Gillen: Objected to because it is obvious to us now that for a period of time there was another store there, another owner of that liquor, at least 900 cases of that liquor, so that I think that question would be too comprehensive.

Mr. Thompson: I will reframe the question, your Honor, and ask for payment of storage charges and other expenses to May, or the end of May, 1946.

Mr. Gillen: May 9th.

Mr. Thompson: All right, May 9th.

The Court: That is the date the 900 cases were transferred to the Bank Club?

Mr. Gillen: Yes, your Honor. As modified, I see no objection to the question.

The Court: Read the question.

(Question read): "Now during the period of storage of that whiskey from the date it was received until May 9, 1946, what payments, if any, did the Nevada Transfer & Warehouse Company receive on account of the storage and other charges?"

A. \$708.96 under date of April 30, 1945.

Q. Do you have any record or recollection of who made that payment?

A. Cal-Neva Lodge, Inc., the record shows check signed by Perkins. [329]

Mr. Thompson: You may cross-examine.

(Testimony of Harry E. Stewart.)

Cross-Examination

By Mr. Gillen:

Mr. Gillen: May it please the Court, since plaintiff's exhibit 63, I believe it is, since the offer of that in evidence was withdrawn by the prosecution, I would like to reserve any cross-examination of Mr. Stewart until such time as evidence might be produced to connect that with the defendant. Now Mr. Stewart resides in Reno and if we need him, we shall ask that he be instructed to return.

Mr. Thompson: If the Court please, I do not see any reason to reserve cross-examination on that account. He has testified, so far as we know, to all he knows regarding that exhibit for identification and we have no objection at this time to counsel questioning him about it.

The Court: Well, I will excuse Mr. Stewart with the understanding he will be available upon adequate notice, a day or two notice, in the event you should want to cross-examine. That will be the understanding.

(Witness excused.)

PIERINO C. BARENGO

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your full name, please?

A. Pierino C. Barengo. [330]

Q. Where do you live?

A. 1429 Arlington Avenue, Reno.

Q. How long have you lived in Reno, Nevada?

A. Thirty-seven years.

Q. Do you have any connection with a business in Reno, Nevada?

A. Yes, at the present time I am partner and manager in the Sierra Wine Company.

Q. How long have you been engaged as partner and manager of that company?

A. As partner just for this year. As manager since 1934.

Q. During the year 1943 did you have a transaction with Elmer Remmer? A. I did.

Q. And when and where did that transaction take place?

A. Well, in his capacity as manager of Cal-Neva, I had regular sales of liquor to him as regular procedure of business. In addition, November 10th—do you want me to continue?

Q. November 10th of what year?

A. 1943; he came to me and told me that he had obtained, through friends in the East, some Burton & Gallagher whiskey.

(Testimony of Pierino C. Barengo.)

Q. How much?

A. To start with it was supposed to be one carload, which amounted to 1200 cases. He gave at that time deposit to me in the amount of 34 thousand dollars, covering the purchase [331] price of the whiskey, freight, taxes and any other expenses.

Q. How was that payment of 34 thousand dollars made? A. That was made in cash.

Q. And on what date was that?

A. November 10th.

Q. Of 1943? A. Right.

Q. What subsequent transactions did you have with Mr. Remmer relating to the purchase and disposition of that whiskey?

A. On November 16th he advised another car was coming and they would have two cars coming, and gave an additional deposit of 20 thousand dollars.

Q. How was that payment made to you?

A. That was made in cash.

Q. When you say cash, do you mean currency?

A. I mean currency.

Q. Was that whiskey received by the Sierra Wine & Liquor Company? A. Yes, it was.

Q. On what date? A. November 16th.

Q. 1943?

A. November 16th and November 18th, two days. Just to reexamine my records on this—November 16th.

Q. Now, when the money was paid to you, Mr. Barengo, the first [332] sum for 34 thousand dollars

(Testimony of Pierino C. Barengo.)

and the second sum for 20 thousand dollars, who paid the money to you? A. Mr. Remmer.

Q. Personally? A. Personally.

Q. On November 16th did the Sierra Wine & Liquor Company receive two carloads of Gallagher & Burton whiskey?

A. No, in rechecking my records, we received the first car on the 12th and the second car on the 16th. I have to correct it again—those are the dates of the sight drafts. We have here notation received November 14th and November 30th. Those are positive.

Mr. Gillen: What are those dates? The dates the liquor was received?

A. Those are the dates we received. The first car we received the 14th of November, 1200 cases; the second car received the 30th of November, 1200 cases.

Q. What kind of liquor was it?

A. Gallagher & Burton.

Q. Both carloads? A. Both carloads.

Q. Did you, after the receipt of the whiskey, or at any time, have any conversation with Mr. Remmer regarding how it should be disposed of?

A. Yes, at the time he ordered it he said it seemed like a [333] rather large amount of whiskey and he said he ordered for himself and some of his friends who were also engaged in the bar business. Liquor at that time being very scarce, we also had had other instances where that had happened.

Q. And do your records show what disposition

(Testimony of Pierino C. Barengo.)

the Sierra Wine & Liquor Company made of the whiskey after it was received?

A. Yes, it does.

Q. Will you testify to the dates and places of delivery?

A. On November 15th we delivered 500 cases to the Palace Club.

Q. That is November 15, 1943? A. 1943.

Q. And did you receive any payment on account of that delivery? A. \$13,865.

Q. Who paid that money?

A. The Palace Club.

Q. All right. What other deliveries did you make? A. Fifty cases to Club 222.

Q. On what date please?

A. The 16th of November.

Q. Is that 222 Club located in Reno?

A. It was, yes.

Q. And also the Palace Club? A. Yes.

Q. And did you receive any payment on that delivery? [334]

A. Yes, we received \$1,386.50.

Q. And who paid you that money?

A. Well, I would say that we collected it from 222 Bruce.

Q. And did you make any other deliveries?

A. Yes, made delivery of 300 cases to the Bank Club and we made a delivery of—

Q. (Interceding): What date was the delivery to the Bank Club?

A. I don't have that positive date here. I don't

(Testimony of Pierino C. Barengo.)

have a copy of the invoice for it. I have just the notation that it was sent there. I presume it to be the 16th.

Q. Of what? A. November.

Q. 1943? A. 1943.

Q. And did you receive any payment at that time?

A. Received \$8,319 from the Bank Club.

Q. Did you also make a delivery to the Silver Dollar Club.

A. There was 100 cases delivered to the Silver Dollar Bar. One order that we sent and we got paid for, \$2773; another order, 100 cases, \$2772, which Mr. Remmer collected.

Mr. Gillen: May I have the dates on those two orders?

A. The first one is 16th of November, 1943. I don't have the date of the other one. I believe it was the next day, the 17th.

Q. What is the total amount of money which the Sierra Wine & Liquor Company collected during the year 1943? As I understand, [335] it was all during the month of November, 1943, which you have testified to, relating to the two carloads of whiskey?

A. Between the deposits and what we collected from the sales was a total of \$80,343.50.

Q. Did that total sum represent an overpayment for the whiskey?

A. The amount is \$17,739.50.

(Testimony of Pierino C. Barengo.)

Q. And what did you do in connection with the amount of overpayment?

A. Check was made out to cash, given to Mr. Remmer, in the amount of \$17,739.50.

Q. Do you have that check with you?

A. I have the check here.

Q. Will you produce it, please? Mr. Barengo, I show you plaintiff's Exhibit 65 for identification. Is that a check drawn on the account of the Sierra Wine & Liquor Company?

Mr. Gillen: We will stipulate if he wants to offer it in evidence, in the interest of time.

Mr. Thompson: We offer it.

The Court: Very well, it will be admitted in evidence. Exhibit 65.

Mr. Thompson: (Reads exhibit.) Endorsed on the back William Kyne.

Q. Mr. Barengo, is that your signature as the maker of the check? [336]

A. That is my signature.

Q. And to whom did you deliver that check?

A. Mr. Remmer.

Q. That is the defendant in this case?

A. Right.

Q. On what date?

A. 17th of November, 1943.

Q. Who is William Kyne who endorsed the check, if you know?

A. I know a William Kyne. I don't know if that is the Mr. William Kyne.

(Testimony of Pierino C. Barengo.)

Q. You didn't deliver this check to a man named William Kyne?

A. I did not. At that time I didn't know him.

Q. Do you have any record of the Sierra Wine & Liquor Company, Mr. Barengo, which summarizes the transactions which you have just related in your testimony?

A. I have the regular ledger sheets of the Cal-Neva Lodge for November of 1943, and the years 1944, 1945, 1946 and 1947. Included in these are the transactions that I mentioned. There is no record there of the sales made to the Bank Club, Club 222, Silver Dollar or Palace Club, as those charges are made direct to those particular accounts, ledger sheets.

Mr. Thompson: I ask that the liquor account produced by the witness be marked plaintiff's 66 for identification and I offer it in evidence.

Mr. Gillen: We will offer the objection to that, may [337] it please the Court, it serves no more than duplication in part of what this gentleman did and not as completely as he testified and does not reflect in any part the transactions of his firm with the Cal-Neva Lodge, a corporation. We think it is incompetent, irrelevant and immaterial under the circumstances.

The Court: It will be admitted in evidence, Exhibit 66.

Q. Mr. Barengo, referring to plaintiff's Exhibit 65, which is the check to cash for \$17,739.50, was that check actually charged against the account of

(Testimony of Pierino C. Barengo.)

the Sierra Wine & Liquor Company and paid out of the account at the bank?

A. That is the only way it could have gotten paid.

Q. Well, was it paid? A. Yes, it was paid.

Q. You have testified, Mr. Barengo, to the receipt of two carloads of Gallagher & Burton liquor and the delivery of 950 cases, as I understand your testimony, 300 cases to the Bank Club, 50 cases to the 222 Club, 100 cases to the Silver Dollar Bar, and 500 cases to the Palace Club, making a total of 950 cases. What did the Sierra Wine & Liquor do with the balance of the whiskey?

A. There was the other sale of 100 cases to the Silver Dollar Bar which was collected by Mr. Remmer.

Q. That would be 1050 cases.

A. Left a balance of 150 cases, of which, in that particular [338] car there had been three cases broken in transit, which left 147 cases, which we kept as security for payment of tax and commission covering the entire transaction.

Q. And did you receive payment of the tax and commission on the transaction?

A. A few years later.

Q. Well, in what year did you receive payment?

A. October of 1945.

Q. And from whom did you receive the payment?

A. I received payment August 9th—I should have referred to this?

(Testimony of Pierino C. Barengo.)

Q. Of 1945?

A. In 1945, from the Bank Club.

Q. In what amount? A. \$4,896.57.

Q. \$4,896.57, is that correct? A. Right.

Q. Upon receipt of that payment, what did you do with the 147 cases of whiskey which you were then holding, as I understand it?

A. That amount was in payment of the 147 cases.

Q. And when you received that money you delivered the cases to the Bank Club, is that correct?

A. That is right.

Q. How about payment of your storage expenses, freight and commission that you referred to? [339]

A. That was covered in this \$4,896.57. We made an agreement that we would receive the whiskey—

Q. (Interceding): Are you referring to an agreement you made with Mr. Remmer?

A. Made a verbal agreement with Mr. Remmer that we were to receive \$1.20 per case for handling this particular shipment.

Q. And your fee then would be \$1.20 times 2400, is that correct? A. That is correct.

Q. Do you know what that amounts to? Do you have a record of it? A. It would be \$2880.

Q. That was your commission? A. Yes.

Q. Or your charge for handling the transaction?

A. That is correct.

Q. What other expenses did you have in connection with the transaction?

A. We paid the tax, but most of that money, the tax money, was included in the deposit because the

(Testimony of Pierino C. Barengo.)

deposit was more actually than the amount of money needed to pay for the whiskey.

Q. Do you have a breakdown of the sum that was paid to you by the Bank Club in 1945?

A. Do I have a breakdown of that amount?

Q. Yes. [340]

A. It may be here in the letter which it appears we demanded payments. The price of whiskey increased, due to the fact there had been some floor tax put on whiskey during that time, from 1943 until it was paid for in 1945. This letter that was written to Mr. Remmer, which has a breakdown of 147 cases, is itemized as to interest and storage charges and insurance, etc. It isn't written by me. It is written by an attorney at possibly the direction of my father and uncle, because at that time I was in the service. This breakdown increases the amount to \$5713.60.

Q. What are the items?

A. 147 cases of—

Mr. Gillen: Just a moment. What kind of memorandum is this?

Mr. Thompson: Will you show the memorandum to counsel, please?

Mr. Gillen: Yes, I would like to see it. He is refreshing his memory from something he didn't prepare himself. May it please the Court, I offer an objection to the last question and answer. As I recollect by his answer or two before, the gentleman on the witness stand said he was in the service

(Testimony of Pierino C. Barengo.)

and apparently there was some correspondence on the part of his father and lawyer.

The Court: I think your objection is good. The objection is sustained and questions and answers relating [341] to that memorandum will be stricken from the record.

Mr. Gillen: Thank you, your Honor.

Q. At any rate, Mr. Barengo, in 1945 you did receive the final payment on that one carload of whiskey, is that correct? A. We did.

Q. And the amount of that payment was what?

A. \$4,896.57.

Q. You received that from the Bank Club upon delivery of the 147 cases to the Bank Club?

A. Correct.

Q. Now what did the Sierra Wine & Liquor Company do with the second carload of whiskey?

A. That car there would have been a breakage of six cases, which were charged to the railroad company and payment received from them on those six cases. The balance of 1194 were delivered to the Nevada Transfer Company, 12-30-43.

Q. That was on December 30, 1943?

A. Yes.

Q. And upon whose order or request was that liquor delivered to the Nevada Transfer & Warehouse Company? A. On my order.

Q. And did you have any conversation with any one relating to what disposition should be made of that whiskey?

Mr. Gillen: Just a moment. [342]

(Testimony of Pierino C. Barengo.)

The Court: Just answer that question yes or no.

A. Yes.

Q. With whom? A. Mr. Remmer.

Q. And when did that conversation take place?

A. About the 18th of November till would be the first week in December.

Q. Some time during that period?

A. During that period, on several occasions during that period.

The Court: In other words, he had several conversations during that period.

Q. What was the conversation relating to the disposition of the second carload of whiskey?

A. Well, we wanted to know who to deliver it to. We wanted to close the entire deal and wanted to know whether he wanted some of his other friends to have some or wanted disposition made to Cal-Neva. Cal-Neva being closed at that time of the year may have hampered his decision in that respect. However, towards the end of the year, when I was unable to reach Mr. Remmer and I wanted to dispose of the whiskey and complete the deal, as I was entering the service in January, I directed my employees to transfer the 1194 cases of Gallagher & Burton over to the transfer company and put it in the name of Cal-Neva Lodge.

Q. And that delivery was made on December 30, 1943? [343] A. That is right.

Q. Do your records show the cost of that carload of whiskey which was delivered to the Nevada Transfer & Warehouse Company?

(Testimony of Pierino C. Barengo.)

A. I have two invoices here covering each car. This invoice just showed the amount of the whiskey fob plant. There is attached to one of the invoices a freight bill covering that particular car. In addition to the freight, there is Nevada State tax, which was paid at that time, upon sale of merchandise I believe.

Q. Will you produce the charges relating to the carload which was delivered to the Nevada Transfer & Warehouse Company?

A. It consisted of freight and State tax and handling charges and receipt for 1194 cases.

Mr. Thompson: I ask that these documents be marked plaintiff's Exhibit 67, your Honor for identification.

The Court: They may be so marked.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [344]

Thursday, December 6, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury stipulated.)

MR. BARENGO

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Thompson: We offer Exhibit 67 in evidence, your Honor.

(Testimony of Pierino C. Barengo.)

Mr. Gillen: No objection.

The Court: It may be admitted.

Q. To refresh your recollection a little bit, Mr. Barengo, as I recall it you, yesterday, testified that your company, the Sierra Wine & Liquor Company, had received two carloads of Gallagher & Burton whiskey and you had testified to the disposition of the first carload in November of 1943, and we were referring to the second carload of whiskey which you said the Sierra Wine & Liquor Company had delivered to the Nevada Transfer & Warehouse Company for storage at the end of December, 1943, is that correct? A. That is correct.

Q. And at the conclusion of the hearing, yesterday, I was questioning you regarding the costs in connection with the second carload of whiskey which was delivered to the Nevada Transfer & Warehouse Company. I now show you Plaintiff's Exhibit 67. By referring to that exhibit, will you itemize the costs [345] incurred and paid by the Sierra Wine & Liquor Company and charged to the Cal-Neva Lodge or Mr. Remmer, in connection with that second carload of whiskey?

A. Drayage on the above of 1,194 cases Gallagher & Burton whiskey, \$50. That is drayage charges our warehouse to the Nevada Transfer Company, \$50. State tax, \$1,432.80; handling charges, \$1,432.80; total of \$2,915.60.

Q. Referring to the handling charges, does that represent the charge of Sierra Wine & Liquor Company at the rate of \$1.20 per case which you testi-

(Testimony of Pierino C. Barengo.)

fied to yesterday? A. That is correct.

Q. Did the Sierra Wine & Liquor Company incur any other charges in connection with that second carload of whiskey which was delivered to the Nevada Transfer & Warehouse Company that you know of? A. None that I recall.

Q. Do your records show what the purchase price was for that carload of whiskey?

A. I have invoices for the two cars of whiskey.

Q. Well, referring to the second carload of whiskey, the one that went to the Nevada Transfer & Warehouse Company, what was the purchase price for that carload?

A. F.O.B. costs was \$24.44 a case.

Q. What is the total extension of the carload?

A. Total of \$29,328.00. The freight charges on that car was [346] \$1,002.09; demurrage, \$4.53. I believe on a breakdown, including the \$1.20 a case handling charge, \$1.20 a case tax, the price comes to \$27.73.

Q. Per case? A. Per case.

Q. By that last statement do you mean that if you multiply \$27.73 by 1,200 you will arrive at the total charges, including the purchase price and all these other items that you have referred to?

A. That is correct.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Barengo, as I recall your testimony given yesterday, you said that in the month of

(Testimony of Pierino C. Barengo.)

November, I believe it was, that Mr. Remmer talked to you about the fact that he was in a position to obtain some whiskey through some friends of his in the East, is that correct? A. That is correct.

Q. And that he was going to get a carload of whiskey and that he intended to see that his friends in and about Reno, who were in the retail liquor business, would share in whatever he was able to get, is that correct? A. That is correct.

Q. And that at a subsequent time, as I recall your testimony, he told you there was going to be a second carload, he would [347] get two carloads, is that correct? A. That is correct.

Q. Let me ask you, as one in the wholesale liquor business, is it unusual and was it unusual at that time, for anybody in the retail liquor business to get a carload of whiskey?

Mr. Thompson: Objected to as immaterial.

The Court: Objection overruled. Answer the question.

A. We have had other customers buy carloads of whiskey previous to shortage and I think with the shortage conditions, I think anyone that would be able to buy a carload of whiskey would take the opportunity at that time.

Q. So it wasn't an unusual thing?

A. It was an unusual thing to get two cars, but he was fortunate to get two cars.

Q. It wasn't an unheard of thing?

A. No.

(Testimony of Pierino C. Barengo.)

Q. Then as I recall your testimony, you stated Mr. Remmer supplied you with a certain amount of money to handle the payment and charges for the whiskey, is that correct?

A. That is correct.

Q. Will you repeat to me again what was the sum of money that you received? There was a deposit of 34 thousand dollars, first—

A. Thirty-four thousand dollars first and 20 thousand dollars later.

Q. And that was after you were told there was a second carload [348] coming? A. Yes.

Q. And immediately upon the first car being received, which as I recall your recollection was about the 16th of November, you were directed to deliver to certain designated persons or concerns certain amounts of the first carload, is that correct?

A. That is correct.

Q. And those who participated, as I recall your testimony, were the Bank Club, the Palace Club, the Silver Dollar Club, and the 222 Club, all of Reno, is that true? A. That is correct.

Q. Then, as I recall your testimony, the Palace Club received 500 cases? A. Right.

Q. And the 222 Club, 50 cases? A. Right.

Q. The Bank Club, 300 cases? A. Right.

Q. And the Silver Dollar Club, 100 cases?

A. Right.

Q. And on November 17th, the Silver Club then received a second 100 cases?

(Testimony of Pierino C. Barengo.)

A. That is right.

Q. As I recall your testimony, you collected for all of this whiskey which was delivered to these other concerns, with the [349] exception of one item on November 17th of the second 100 cases sent to the Silver Dollar Club, which you was—Mr. Remmer collected himself, so you were informed?

A. That is true.

Q. As to all the others, you collected the money?

A. Yes.

Q. And were those collections, or were the amounts charged, on the basis of \$27.73 per case that you indicated?

A. Yes.

Q. In other words, the people who benefited by the arrival of this first carload of whiskey, the Palace Club, the 222 Club and the Bank Club and Silver Dollar Club, paid exactly what Mr. Remmer paid for it?

A. That is correct.

Q. Now you have broken down for us, Mr. Barengo, the exact cost of this whiskey as it passed through your hands, have you not?

A. Yes.

Q. And you broke it down as to the second carload, is that true?

A. That is true.

Q. And that second carload, as I recall, is the carload that you had nothing to do with the disposal of, with the exception that on December 30th of that year, Mr. Remmer being away and you not having had any specific instructions as to what to do with that second carload, and you being on the verge of entering the service, placed it in the ware-

(Testimony of Pierino C. Barengo.)

house to the credit of the [350] Cal-Neva Lodge, is that correct? A. That is correct.

Q. Now that was the carload you broke down for us in the price. I believe you said the original price of the whiskey per case was \$24.44, is that correct? A. That is correct.

Q. And then with the \$1.20 state tax, the \$1.20 handling charge that your firm charged and the other over-all expenses on the carload, increased the price from \$24.44 to \$27.73, is that true?

A. Eighty-nine cents a case freight and demurrage brings it to 89 cents, making a total of \$27.73.

Q. Now let me ask you, Mr. Barengo, was that the actual financial set up or cost set up, insofar as the first carload was concerned; in other words, were the charges identical?

A. They were identical with the exception of \$50 drayage charge that we charged.

Q. That was the charge for draying it from your establishment to the Nevada Transfer & Warehouse? A. That is correct.

Q. But I mean, counsel asked you with reference to the second carload which was turned over to the drayage company, the cost was \$24.44 and showing an increase to \$27.73, by reason of the charges, you recall that, do you?

A. Yes. [351]

Q. Now I am asking you did that hold as to the first carload also, the carload that was sold by you, namely, that each case cost \$24.44, were the other charges identical with the exception there was that

(Testimony of Pierino C. Barengo.)

additional \$50 for transferring from your company to the warehouse?

A. We assume that the cost was identical, the bill went out at that price.

Q. You handled the money to buy that whiskey?

A. That is right.

Q. And paid the charges?

A. That is right.

Q. And did deduct your own handling charges?

A. That is right.

Q. And was identical up to that point, with the exception of the addition of \$50 which you explained? A. That is correct.

Q. Now as to the first carload that arrived, Mr. Barengo, you having collected the money to purchase that whiskey and handle it, you know of your own knowledge that the whiskey was sold for exactly what it cost Mr. Remmer and there was no profit to Mr. Remmer, is that correct?

A. To my knowledge.

Q. I mean, you collected what was paid?

A. That is right. I billed it out.

Q. And as to the second carload, having turned it over to the [352] warehouse, you don't know what became of that? A. That is correct.

Q. You went into service the early part of the following year? A. That is correct.

Mr. Gillen: I think that is all, thank you.

(Testimony of Pierino C. Barengo.)

Redirect Examination

By Mr. Thompson:

Q. Mr. Barengo, as I recall your testimony, the actual amount of money that you received for the two carloads of whiskey from Mr. Remmer, that is, the 54 thousand dollars he paid you, plus the amounts paid you by the Bank Club, the Silver Dollar Bar and the Palace Club, was \$80,343.50, is that correct?

A. And the 222 Club. \$80,343.50.

Q. And after computing your charges on the two carloads, you found that the total amount of your charges was \$62,604, is that right?

A. \$62,604.

Q. And you then remitted the balance to Mr. Remmer by check which is in evidence in the amount of \$17,739.50?

A. That is correct.

Mr. Thompson: That's all.

Recross-Examination

By Mr. Gillen:

Q. Mr. Barengo, the reason you remitted 17 thousand odd dollars to Mr. Remmer was that Mr. Remmer had deposited with you more than was necessary to cover the cost, isn't that correct?

A. That is correct. [353]

Q. And, by the way, I omitted asking you—I understood your testimony to be that you retained in your company 147 cases to secure you for

(Testimony of Pierino C. Barengo.)

any additional charges, the balance of the charges that were due your firm, is that correct?

A. That is correct.

Q. And that was paid by the Bank Club when they took delivery of the 147 cases?

A. That is correct.

(Witness excused.)

PATRICK A. MOONEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Patrick Mooney.

Q. Where do you reside, Mr. Mooney?

A. 800 So. Seventh Street, Reno.

Q. How long have you been a resident of Nevada? A. Since 1906.

Q. What is your present occupation, Mr. Mooney? A. I am retired.

Q. And what was your former occupation?

A. With the Internal Revenue Department for 15 years.

Q. Over what period of time were you with the Department? A. 1933, to August 31, 1948.

Q. And at that time you retired? [354]

A. Yes.

Q. And with what office of the Bureau of Internal Revenue were you associated?

(Testimony of Patrick A. Mooney.)

A. I was with the Internal Revenue Department.

Q. With what office were you, with the collector's office? A. With the collector's office.

Q. And what was your position in the collector's office?

A. I was deputy collector in Las Vegas from October, 1933, to January 1, 1946, deputy collector.

Q. Now are you acquainted with the defendant, Elmer Remmer? A. Yes.

Q. How long have you known him?

A. About '37.

Q. Since 1937? A. Yes.

Q. Are you acquainted with his wife, Helen Remmer? A. I met her once.

Q. Do you recall when that was?

A. That was about the year '45. I met her at one time, just introduced to her and that was all.

Q. That was the only time that you have ever met Mrs. Remmer? A. Right.

Q. Now in connection with your duties as a deputy collector, was it a part of your duties to make out income tax returns for those requesting that service? [355] A. Yes.

Q. Have you on any occasion made out any income tax returns for the defendant, Elmer Remmer? A. I have.

Q. Do you recall for what years?

A. In 1941, he came to me in front of the Golden Hotel in Reno and he——

Q. (Interrupting): I asked you for what years

(Testimony of Patrick A. Mooney.)

you made out returns for him, if you recall, Mr. Mooney?

A. I think I made them out ever since, '41 to '47.

Q. Do you recall definitely that you made out a return for 1941? A. Yes.

Q. Was that return filed, if you know?

A. Yes.

Q. For the purpose of refreshing your recollection, I wish to state that a deputy collector has appeared here and stated that the first return filed since 1935, by Mr. Remmer, was filed for the calendar year 1942.

A. I don't know anything about the '35 return. I was in Las Vegas at that time.

Q. As I say, the first return since that time filed by Mr. Remmer was for the calendar year for 1942.

A. Well, it might have been '42. I will tell you the circumstances if it is permissible.

Q. We will come to that in just a moment. At any rate, after [356] you assisted in preparing the first return for him, you then continued to do so each year, is that correct?

A. Each year, right.

Q. And did you also assist in preparing the returns for his wife, Helen Remmer? A. No.

Q. Or in the name of Helen Remmer?

A. That is right.

Q. You did assist in preparing returns in the name of Helen Remmer, is that right?

(Testimony of Patrick A. Mooney.)

A. They split returns on the community property basis.

Q. Mr. Mooney, I am going to show you Government's Exhibit 9, which purports to be the income tax return of Elmer F. Remmer for the year 1942, which bears a preparation date of March 13, 1943, and ask you if that is a return which you assisted in preparing?

A. That is in typing. There is no writing of mine on there.

Q. Are you able to state whether or not that was one of the returns that you prepared?

A. It was for ten thousand dollars or a like amount, very close to it.

Q. I call your attention to the fact that the net income shown here, before division with his wife, is the sum of \$10,915.

A. That's right.

Q. Would that refresh your recollection that this is a return [357] which you prepared?

A. Yes, sir.

Q. I have here a like return, being Government's Exhibit 10, return of his wife, Helen L. Remmer, for 1942, prepared on the same date and showing the same income before division of \$10,915, and ask you if that also then was prepared by you, to the best of your recollection?

A. To the best of my recollection, yes.

Q. Now will you state, Mr. Mooney, the circumstances which you were about to relate, under which you prepared these returns?

Mr. Avakian: Just a moment. That question is

(Testimony of Patrick A. Mooney.)

objected to as being based on facts which are not in evidence, because Mr. Mooney, in a prior explanation which he was about to make said he was referring to the first return he prepared and he thought it was for the year 1941, and there is no evidence in the record that this 1942 return is that first return. Mr. Mooney wasn't sure that it was 1942, or 1941, as the year for which he prepared a return.

The Court: Objection is overruled.

Q. Now will you proceed, Mr. Mooney?

A. He met me in front of the Golden Hotel.

Q. Are you referring to Mr. Remmer now?

A. Yes, sir.

Q. Proceed.

A. He met me in front of the Golden and he said, "I want to file [358] an income tax return." I says, I asked him what he wanted to put in as his occupation. He says, "Gaming," and I says, "How did you make this money?" He said, "I won it on the Kentucky Derby," and I says, "How much do you want to file?" He said, "I made \$10,915," and he took no deductions of any kind, as I remember.

Q. Did he on that occasion show you any records of any kind? A. No records, not a thing.

Q. Was anything said on that occasion as to whether or not he had filed returns for previous years? A. Not a thing.

Q. What was that?

A. No reference to any previous years.

(Testimony of Patrick A. Mooney.)

Q. Now did you then on that occasion prepare returns for Mr. Remmer and his wife based upon the figure which he gave you?

A. I don't quite get you.

Q. Did you fill in a return with the figure that he gave you? A. Yes.

Q. And did you prepare a return for his wife, showing that as community income? A. Yes.

Q. Were you present when Mr. Remmer signed his return? A. Yes.

Q. I call your attention to the fact that on Government's Exhibit 10 the return for Helen Remmer, the signature is Helen L. [359] Remmer by Elmer Remmer? A. That's right.

Q. Was that signed in your presence?

A. Yes.

Q. And by whom? A. By Mr. Remmer.

Q. At that time you had, I take it, never seen Mrs. Remmer? A. No.

Q. Now after having prepared that return, did you each year thereafter prepare returns for Mrs. Remmer? A. Yes, sir.

Q. And where were those returns prepared?

A. I think in 1943, I am not sure, I got the information from Mr. Simmons in El Cerrito.

Q. Where, physically, did you prepare the returns?

A. I got the figures and prepared them in Reno.

Q. Where did you get the figures?

A. From Mr. Simmons and Willie Kyne. I

(Testimony of Patrick A. Mooney.)

think I got them in '43, from Mr. Simmons and Mr. Kyne. Mr. Kyne drove me over——

Q. (Interrupting): Just a minute. For '43, you mean for 1943 return or figures that you got during the year 1943?

A. The figures I got, yes.

Q. For 1943 return? A. Yes.

Q. Do you recall Mr. Simmons' first [360] name? A. I don't recall it, no.

Q. Was it George Simmons?

A. I don't think it was. I have some letters here.

Q. Was the name Lester Simmons?

A. I wouldn't be sure.

Q. Do you have something with you that would refresh your recollection?

A. I have some letters, I wrote them about tax matters.

Q. Would they assist you in recalling Mr. Simmons' first name? A. I think they would.

Q. Would you look at those then and tell us Mr. Simmons' first name?

A. It may be only the initials, I don't know. Mr. G. E. Simmons, San Pablo Avenue, El Cerrito.

Q. Mr. G. E. Simmons?

A. Yes. See if that is the correct initial.

Q. That is correct, sir. Now, Mr. Mooney, I am going to show you Government's Exhibit 7, the individual income tax return of Elmer F. Remmer for the year 1943, and I direct your attention specifically to the signature of the person preparing the

(Testimony of Patrick A. Mooney.)

same, and ask you if you prepared that return?

A. This is my handwriting under Mr. Remmer's signature.

Q. Can you state that you prepared that return?

A. Yes, sir; that is my handwriting.

Q. And did you at the same time prepare a return in the name [361] of his wife for one-half interest in the income?

A. Yes, I believe that year I sent the return to Mrs. Remmer—I am not sure now—for signature. I think she may have signed it that particular year.

Q. Now what was the source of the figures which you placed in this 1943 return, Government's Exhibit 7?

A. It came from the 21 Club, as I remember it, in El Cerrito.

Q. Who gave you those figures?

A. Mr. Simmons, partnership return 1065.

Q. Did you, yourself, examine any books or records?

A. None, whatsoever.

Q. Did you question any of the figures which were provided to you?

A. None at all. Didn't question anything.

Q. I observe, Mr. Mooney, that on this return, Government's Exhibit 7, you placed, I believe you say in your handwriting, the words, "Taxpayer's figures"?

A. Yes, sir.

Q. By that are you referring to the fact that you saw no figures?

A. Right.

Q. I show you Government's Exhibit 1, the individual income tax return of Elmer F. Remmer,

(Testimony of Patrick A. Mooney.)

for the calendar year 1944, and ask you if you prepared this return? A. Yes, sir.

Q. Did you prepare a like return, dividing the income, in the [362] name of Helen L. Remmer? I show you Government's Exhibit 2, being the individual income tax return for the year 1944, of Helen L. Remmer. A. Yes.

Q. Those are both in your writing?

A. Yes, sir.

Q. Were they signed in your presence, Mr. Mooney?

A. Mr. Remmer signed them in my presence.

Q. Now as to Mrs. Remmer's return, by whom was that signed?

A. By Mr. Remmer, I believe. I don't believe she ever signed the returns.

Q. Do you have a recollection as to whether or not Mr. Remmer signed this return for her?

A. Yes, he signed all returns.

Q. Now what was the source of the figures which you placed in those 1944 returns?

A. I think Willie Kyne couldn't give me the figures, he was in the navy, and I filed 1040ES with no payment. That is an estimate of 30 thousand dollars. I went to Mr. Remmer and asked him if I could have some money on the estimate and he said he was short of funds and couldn't pay anything right now. I asked the chief of the income tax division what we would do about it—

Q. (Interrupting): No, I asked you, Mr. Mooney, where you got the figures that went into that final return?

(Testimony of Patrick A. Mooney.)

A. On the estimate of 20 thousand dollars. [363]

Q. Whose estimate was it that the income was 20 thousand dollars?

A. Elmer F. Remmer and Helen L. Remmer.

Q. You didn't supply the figure? A. No.

Mr. Avakian: Your Honor, if I may be permitted to interrupt. I believe the prosecutor interrupted Mr. Mooney when he was giving an explanation as to when and how this estimate was filed and I think after Mr. Campbell interrupted him, he began from the 1040 estimate.

The Court: Will you ask the question again and if the witness desires to make an explanation, he may do so. Will you ask the question again?

Q. What was the source of the 20 thousand dollar income figure which is placed in that return?

A. The 21 Club at El Cerrito.

Q. Who supplied the figure of 20 thousand dollars?

A. I think Mr. Remmer and myself agreed on that figure.

Q. You say you agreed upon it together?

A. We agreed tentatively on that 1040ES, the estimate. I asked him how much he was going to make and he said around 20 thousand dollars, I think.

Mr. Avakian: Your Honor—

The Court (Interceding): Have you any further explanation you want to make, Mr. Mooney, on that question? [364] Have you answered it to your satisfaction, on this last question?

(Testimony of Patrick A. Mooney.)

A. I can't hear.

The Court: I just want to know if you have completed the answer. Counsel has indicated that he feels that you wanted to make a further explanation, so have you answered it as fully as you desire?

A. The answer I made in full is all right. I believe the 1944 return was a 1040ES estimate. There is some correspondence, I believe, in the file some place that will show that I had some question. I went to Mr. Simmons that year to find the 1065, which is the partnership return, at El Cerrito and it was in the hands of Mr. Lewis and some other gentleman. Mr. Lewis was the former Collector of Internal Revenue in San Francisco and he had an office on Montgomery Street, and I couldn't get the return, so I had to file it before it was delinquent.

Q. Did you then discuss it with Mr. Remmer?

A. I don't believe I did.

Q. When did you first discuss that return with Mr. Remmer?

A. When he signed it. He paid the money. I believe he paid half the money.

Q. I call your attention to the fact that this return bears the stamp "Received with remittance, April 13, 1945."

A. I think he had an extension.

Q. Yes, but I call your attention to the remittance stamp, [365] "April 13, 1945, Collector of Internal Revenue, District of Nevada."

A. Is that the full amount of the tax?

(Testimony of Patrick A. Mooney.)

Q. That would indicate that there still remained a balance due at that time? A. Yes, sir.

Q. But was that the date that you discussed with Mr. Remmer this 20 thousand dollar figure and he signed the return?

Mr. Gillen: Just a moment. I am becoming a little confused on this. I first understood that counsel was asking about the 1943 return which Mr. Mooney identified as an estimate.

Mr. Campbell: No, 1944.

Mr. Gillen: I should have said 1944 return, not 1943, that Mr. Mooney called an estimate and suddenly, apparently, the return itself has come into the picture and I am trying to follow it, whether the discussion about the 20 thousand dollars took place at the time the estimate was agreed upon or whether it was discussed at the time the actual estimate itself was filed and part payment paid on it.

Mr. Campbell: No, I think you misunderstood me, Mr. Gillen. He was shown Plaintiff's Exhibit 1, the return for 1944. It is 1944 return.

Mr. Gillen: That is the actual return?

Mr. Campbell: That is correct, which shows figure of 20 thousand dollars filed on a CP basis on the face of the [366] return.

(Discussion between counsel.)

Mr. Campbell: Possibly I can straighten it out by a question or two. It is a difficult situation.

Q. I will show you again, Mr. Mooney, this

(Testimony of Patrick A. Mooney.)

Government's Exhibit 1 and ask you if that is the return that you referred to as having originally been prepared by you?

Mr. Gillen: That is 1944 return?

Mr. Campbell: That is the 1944 return.

A. This is my writing.

Q. Now is it your recollection that you prepared some document or estimate prior to preparing that?

A. I disremember.

Q. I beg your pardon?

A. I don't remember. I may have——

Q. You think you may have some memoranda on the subject?

A. I believe there is something here.

Mr. Campbell: May I suggest the morning recess? Will you examine your records for that while we have recess, Mr. Mooney?

(Jury and alternate jurors admonished and recess taken at 10:55 a.m.)

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [367]

MR. MOONEY

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Mooney, just before the recess I was showing you this 1944 return of Elmer Remmer, which is Government's Exhibit No. 1. This return, which is on a community property basis, shows under the item, "Your Income," "Various self-employed \$20,000," then divides the income as between the husband and wife, \$10,000 each shows a tax liability of \$2,570, with a payment based on declaration of estimated tax of \$1,500 and a balance due of \$1,070, which was paid on April 13, 1945, whereupon interest was assessed. At that time you stated that an estimate had been filed and that you believed you had some information regarding it, that you would examine your files for that purpose. Have you done so? (Witness hands counsel paper.) The record will show that the witness has handed me what purports to be a carbon copy of a letter, which I will have marked for identification as 68 for identification.

Mr. Gillen: No objection to this being offered in evidence. I might state, however, that we do

(Testimony of Patrick A. Mooney.)

have the original signed letter, of counsel would like to offer that instead, on the letterhead of the Treasury Department and signed by Mr. Mooney.

Mr. Campbell: Yes, under representation of counsel, we will accept the stipulation and let the record show that counsel has produced the original of the carbon copy which Mr. [368] Mooney has produced, which will be offered as government's Exhibit 68.

The Court: It may be admitted in evidence, Exhibit 68.

Q. Now, Mr. Mooney, I observed that on March 20, 1945—and I am reading from plaintiff's Exhibit 68—you wrote Mr. Remmer as follows: (Reads Exhibit 68.) Do you recall having written him that letter? A. Yes, sir.

Q. And showing you again plaintiff's Exhibit No. 1, the 1944 return, is that the 1040 that you sent him in the letter of March 20, which I have just read to you? A. I believe it is.

Q. Now did Mr. Remmer ever thereafter produce to you any data from his different places, so that a proper amended return might be filed?

A. To the best of my knowledge, no. 1946—we will come to that later.

Q. Yes, but so far as the year 1944 is concerned, you never received any additional information, is that correct? A. Yes.

Q. I have previously shown you the return of Helen Remmer for the year 1944 and ask you if

(Testimony of Patrick A. Mooney.)

your testimony is the same with regard to that return? A. Absolutely.

The Court: That is Exhibit 2? [369]

Mr. Campbell: Exhibit 2, yes.

Q. Showing you government's Exhibit 3, the individual income tax return for the calendar year 1945 of Elmer F. Remmer, I will ask you if you prepared this return? A. Yes, sir.

Q. And referring to government's Exhibit 4, did you prepare a similar return in the name of Helen L. Remmer? A. Yes, sir.

Q. Were these returns signed in your presence?

A. Mr. Remmer signed them in my presence.

Q. You say Mr. Remmer signed them—do you refer to both returns?

A. I believe both—give me Helen's and I will tell you.

Q. I am handing the witness plaintiff's Exhibit 4.

Q. This is Mr. Remmer's writing?

Q. That is Mr. Remmer's writing?

A. Yes.

Q. Let me ask you this, what was the source of the figures which you placed in this return?

A. I got them from the 1065 partnership return.

Q. Partnership return of whom?

A. Of the Menlo Club and the various other clubs.

Q. I call your attention to the fact that there is attached a typewritten schedule reading as follows:

(Testimony of Patrick A. Mooney.)

(Reads schedule.) Now who supplied you with those figures or that table? [370]

A. Mr. Maundrell, the bookkeeper in the partnership return. I never saw any books.

Q. Mr. Maundrell is the bookkeeper for whom?

A. For Mr. Remmer.

Q. Did you examine any books or records of any kind? A. Not a thing.

Q. Where was it that you secured these figures?

A. At 50 Mason Street, San Francisco.

Q. Did you go to San Francisco for that purpose? A. Yes, sir.

Q. And at whose expense?

A. At Mr. Remmer's. He gave me the actual expenses of my trip and I took my vacation time off to make the returns, not on government time.

Q. You did that on your own time, is that correct? A. On my own time.

Q. At this time I will show you government's Exhibit 5, the individual income tax return of Elmer F. Remmer for the year 1946 and ask you if you prepared this return as well as plaintiff's Exhibit 6, the return of Helen L. Remmer, for the year 1946? A. Yes, sir.

Q. Who supplied you with the figures which were placed in that return?

A. Mr. Maundrell. [371]

Q. Did you yourself examine any books or records in connection with the figures which went into that return?

A. Nothing but the partnership return, 1065.

(Testimony of Patrick A. Mooney.)

Q. You accepted the figures which were given to you?
A. Absolutely.

Q. And where were those returns prepared?

A. As far as I know, I prepared them in Reno. I got the figures in San Francisco.

Q. Under a similar circumstance to that of the preceding year?
A. Yes, sir.

Q. Were those returns signed in your presence?

A. Mr. Remmer signed them, yes.

Q. Will you examine the return of Helen Remmer and state whether or not that was signed in your presence?
A. Yes, sir.

Q. And by whom was it signed?

A. Mr. Remmer, both of them.

Q. Did you question any of the figures that were given to you in connection with these returns?

A. There were three or four purchases Mr. Remmer spoke to me about.

Q. Did you question any figures?
A. No.

Q. You understood, did you not, Mr. Mooney, that when I refer to examining records, I refer to any books of account, [372] cancelled checks, bank statements, anything of that nature?

A. Not a thing. All the figures are derived from partnership returns. I never looked at the books.

Q. And those partnership returns were shown you by whom?

A. Mr. Maundrell and Mr. Simmons in El Cerrito on two occasions, I believe.

Q. On the first two occasions I believe Mr. Simmons and Mr. Kyne?

(Testimony of Patrick A. Mooney.)

A. Mr. Kyne, he was in the navy, I don't know when. This one year, the 1944 year, is the one that Mr. Kyne wasn't there. He used to supply me with all the information.

Q. In 1945 and 1946 the figures were supplied to you by Mr. Maundrell, is that correct?

A. Mr. Maundrell, yes, and there was another—Mr. Maundrell only kept the accounts of the Menlo Club, I believe, and there was another accountant used to take care of the other places by the name of Atkin. I just met him once.

Q. Did he supply you with figures of the other places, or did Mr. Maundrell?

A. I disremember. I met him in the office just once, I believe. I understand he has since died.

Q. Now, Mr. Mooney, you have been subpoenaed as secretary and treasurer of the Mountain City Consolidated Copper Company, a corporation, to produce here certain stock transfer records relative to the issuance of certain shares of stock of [373] that corporation. Have you produced those records?

A. I think I have them.

Q. Will you produce those, please.

A. What do you want to find out from the records, Mr. Remmer's connection?

Q. As the question has been asked, yes, sir.

(Witness produces records.)

Mr. Campbell: May I inquire if counsel require that these be marked for identification or may

(Testimony of Patrick A. Mooney.)

they be viewed and oral testimony given and the records returned to Mr. Mooney?

Mr. Gillen: We would be willing to stipulate that they may be viewed and orally testified from, and I think we would be willing to produce, if it is desired, the original stock certificates.

Mr. Campbell: I do not think it would be necessary to bring the original certificates so long as we have the testimony.

The Court: I understand it has been stipulated that oral testimony of the exhibit can be used in place of the record itself, and the exhibit will be marked for identification next in order.

Mr. Campbell: My understanding was, your Honor—well yes, it can be marked for identification and we ask it be withdrawn and returned.

The Court: Very well, 69, the stock book. [374]

Mr. Campbell: Which would be the stock book of the Mountain City Consolidated Copper Company.

Q. Mr. Mooney, were certain shares of stock of the Mountain City Consolidated Copper Company sold to the defendant, Elmer F. Remmer?

A. Six thousand shares.

Q. And upon what date were those shares of stock sold to him?

A. The 29th of August, 1946.

Q. And what amount of money did he pay for them?

A. Forty cents a share, \$2400.

Q. Did I understand \$2400?

(Testimony of Patrick A. Mooney.)

A. Right; 40 cents a share.

Q. And on what date did he make that payment?

A. I believe the same date.

Q. That is to say, August 29, 1946?

A. I believe it was the same day.

Q. And did you receive that money from him in your capacity as secretary and treasurer of the Mountain City Consolidated Copper Company?

A. Yes.

Q. Were shares of stock issued to Mr. Remmer in return for that \$2400? A. Yes, sir.

Q. And are those shares of stock still outstanding in Mr. Remmer's name, according to the records of your corporation? [375]

A. On the 3rd of February, 1947, he became dissatisfied and he said, "You might sell them."

Q. That is not my question. Are they or are they not outstanding at this time?

A. They are outstanding in Mr. Remmer's name.

Q. And were they outstanding in his name as of the 30th day of December, 1946?

A. Yes, to the best of my knowledge.

Q. Or the 31st of December, 1946?

A. Yes.

Mr. Campbell: If the Court please, a subpoena has been issued to one Lawrence Semenza of Reno, Nevada, for the production of certain records, which I will ask to be produced at this time and deposited with the clerk of the court. Is Mr. Semenza present?

(Testimony of Patrick A. Mooney.)

Mr. Avakian: May we inquire what the records are? Perhaps we can make them available.

Mr. Campbell: The subpoena calls for the following records of the B & R Smoke Shoppe; general ledger and general journal, receipts and disbursements record March 1, 1943, to January 31, 1946, and receipts and disbursements record January 1, 1946, to December 31, 1946. The following records of 110 Eddy Street: general ledger, cash receipts and disbursements November 1, 1942, to January 31, 1946, cash receipts and disbursements January 1, 1946, to December 31, 1946. The following records [376] of the Transit Smoke Shop, 85 First Street: November and December, 1946, cash receipts and disbursements. The following records from the Menlo Club: receipts and disbursements 1947 and general ledger, cash receipts and disbursements 1946, Tiny's Restaurant 1946 receipts and disbursements, 1945 receipts and disbursements bar and restaurant, and 1946 receipts and disbursements bar. File on inventory of the following: B & R Smoke Shoppe, daily diary 1942, daily diary 1943, daily diary 1945, daily diary 1946; (7) list of cashier checks bought by B & R Smoke Shoppe; following records of Cal-Neva Lodge: combined journal and ledger, 1937 to 1947, inclusive; pay roll records, 1937 to 1946, inclusive, and all invoices, check stubs, cancelled checks, bank statements and game sheets for the years 1937 and 1946, inclusive. Check in the amount of \$7,724.11 dated August 28, 1946, drawn on the Collector of Internal Revenue,

from which check signature has been torn; check No. 227, amount \$2,400, dated August 31, 1946, drawn to Mountain City Consolidated Copper Company, signed by James B. Jeffers; check in amount of \$5,324, dated August 21st, drawn to the order of Collector of Internal Revenue.

Mr. Avakian: May I inquire of counsel whether, in connection with cross-examination of Mr. Mooney, he wants all those documents or whether for the purpose of this direct examination he desires only the last three checks he mentioned at this moment? [377]

Mr. Campbell: Of course, I desire all the records subpoenaed of Mr. Semenza. For immediate purposes, however, I would be satisfied with the last three checks.

Mr. Avakian: May I suggest Mr. Semenza be sworn and questioned as to his knowledge of the whereabouts of those three checks?

Mr. Campbell: I think that should be done outside the presence of the jury.

Mr. Avakian: But if he is going to be questioned regarding this case, it should be in the presence of the jury.

The Court: I think when a subpoena has been served and it appears the subpoena is not complied with for some reason or other, I don't know, because Mr. Semenza announced he doesn't have the records, he has not produced them, that any investigation of the matter should be outside the presence of the jury, so we will excuse the jury.

Mr. Avakian: Before the jury is excused, may I first take exception to your Honor's ruling?

The Court: It is not necessary. You can have exception to any ruling the court makes at any time and it is so understood.

Mr. Avakian: May we ask the Court to instruct the jury to disregard the comments made on this matter in their presence? [378]

The Court: I have already informed the jury, and I think it is not necessary to do it every time some remark is made by counsel and the Court, but I will do it again. Any exchanges that have taken place in this court room, from the very beginning of this trial all through to the end, between counsel, remarks by counsel, exchanges between the Court and counsel, remarks by the Court, are not evidence in this case and you will be finally instructed. You have already been informed, in your examination as to your qualifications to become jurors, that it is your duty, and will be your duty, to decide the case entirely upon the evidence and nothing else, so remarks by the court, remarks by counsel, are not evidence and the Court has not, and will not at any time indicate any idea as to how you should decide the case on any question. So the matter is entirely in your hands and to be decided only upon the evidence produced from the mouths of the witnesses and the documents which are admitted in evidence.

(Jury and alternate jurors admonished and excused at 11:45.) [379]